Supreme Court, U.S.
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No. 03-1052

In The
Supreme Court of the United States

GLENDALE UNIFIED HIGH SCHOOL
DISTRICT NO. 205 OF MARICOPA COUNTY,

Petitioner,

vs.

SHELLEY SAVAGE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a State-created school district should be denied Eleventh Amendment immunity as afforded under *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001), when a judgment against it will be satisfied from state funds because the State is congressionally and State constitutionally-required to exclusively control the State public school system and the State is solely responsible for financing the State public school system?

PARTIES TO THE PROCEEDINGS

The caption of this case contains the names of all parties. Shelley Savage, the plaintiff in the trial court and the Respondent here, formerly was employed by and later sued, Petitioner Glendale Unified High School District No. 205 of Maricopa County (hereinafter referred to as "Petitioner GUHSD"). Petitioner GUHSD is a governmental entity.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered September 10, 2003.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit that gives rise to this petition is published as *Savage v. Glendale Unified High Sch. Dist. No. 205, Maricopa County*, 343 F.3d 1036 (9th Cir. 2003), and is reprinted in the Appendix ("App.") at 1. The order of the district court denying Petitioner GUHSD's motion to dismiss for lack of subject matter jurisdiction is unreported and reproduced at App. 30. The Ninth Circuit's order denying rehearing with suggestion for rehearing en banc is unreported and reproduced at App. 60.

STATEMENT OF JURISDICTION

Jurisdiction existed in the district court under 28 U.S.C. § 1331. The Ninth Circuit's panel opinion sought to be reviewed was entered on September 10, 2003. Petitioner filed a timely Petition for Rehearing, with Suggestion for Rehearing En Banc on September 24, 2003, which was denied on October 22, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State.

Arizona's Enabling Act is codified at Act of June 20, 1910, c. 310, 36 Stat. 557, 568-579. The relevant provision of the Enabling Act provides in pertinent part:

> **Sec. 26.** That the schools, colleges, and universities provided for in this Act shall forever remain under the exclusive control of said State, and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college, or university.

The Arizona state constitutional provisions regarding the establishment, maintenance, and funding of Arizona's public school system are codified at ARIZ. CONST. art. XI. The relevant provisions of Article XI provide in pertinent part:

> Section 1. **A.** The legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system, which system shall include:
>
> 1. Kindergarten schools.
> 2. Common schools.
> 3. High schools.

4. Normal schools.

5. Industrial schools.

6. Universities, which shall include an agricultural college, a school of mines, and such other technical schools as may be essential, until such time as it may be deemed advisable to establish separate state institutions of such character.

Section 10. The revenue for the maintenance of the respective State educational institutions shall be derived from the investment of the proceeds of the sale, and from the rental of such lands as have been set aside by the Enabling Act approved June 20, 1910, or other legislative enactment of the United States, for the use and benefit of the respective State educational institutions. In addition to such income the Legislature shall make such appropriations, to be met by taxation, as shall insure the proper maintenance of all State educational institutions, and shall make such special appropriations as shall provide for their development and improvement.

The entire Article XI is reproduced at App. 61.

STATEMENT OF THE CASE

1. GUHSD submits this petition to obtain review of a decision by the Ninth Circuit holding that Petitioner, an Arizona school district, cannot invoke the Eleventh Amendment Immunity afforded to States and its agencies from private suits under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act as afforded pursuant to *Board of Trustees of the Univ. of Ala. v.*

Garrett, 531 U.S. 356 (2001). The Ninth Circuit erroneously concluded that Arizona school districts were not arms of the State based upon *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 279 (1977), which looked to how the state-law treated the entity, and *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994), which concluded that the vulnerability of the State's purse is the most salient factor in determining Eleventh Amendment immunity. In light of Arizona's Enabling Act and Arizona's constitutional provisions that were interpreted by the Arizona Supreme Court to require that the State of Arizona exclusively create and control Arizona's public school system and to require that school financing is solely a "state obligation", this Court should grant certiorari and reverse the decision below.

2. This case commenced in August 2000, when Respondent Shelley Savage filed a lawsuit in the United States District Court for the District of Arizona. Respondent claimed discrimination by Petitioner GUHSD on the basis of disability, in violation of Title I of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 – 12117, and Section 504 of the Rehabilitation Act of 1973 ("the Rehabilitation Act"), 29 U.S.C. § 794. Respondent, a probationary employee working for GUHSD as an Educational Services Technician at Independence High School, asserted that Petitioner subjected Respondent to discriminatory terms and conditions of employment by requiring that Respondent affix a flag and flagpole to her wheel-chair so that she would be more visible to students in the computer lab. Respondent asserted that Petitioner retaliated against her by terminating her for refusing to affix the flag and flagpole to her wheel-chair and for opposing discriminatory

conditions. Respondent also claimed violations of the Arizona Civil Rights Act ("ACRA"), A.R.S. § 41-1463. [App. 65].

3. On February 21, 2001, this Court decided *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001), and concluded that Congress did not validly abrogate the States' Eleventh Amendment immunity under Title I of the ADA. In light of *Garrett*, Petitioner GUHSD submitted a Motion to Dismiss for lack of subject matter jurisdiction, contending, among other things, that Respondent's claims under the ADA and Rehabilitation Act are barred by the Eleventh Amendment because Petitioner GUHSD was an arm of the State.

4. On August 8, 2001, Respondent filed a nearly identical complaint in state court styled *Savage v. Glendale Unified High School District No. 205, Maricopa County et al.*, Maricopa County Superior Court Case No. CV 2001-013740. [App. 77]. The state case is stayed by stipulation of the parties.

5. The district court rejected Petitioner's argument and denied Petitioner's motion to dismiss.

6. A panel of the Ninth Circuit (per Thomas, J.) affirmed. The panel applied the five factors enumerated in *Mitchell v. Los Angeles Cmty. Coll. Dist.*, 861 F.2d 198 (9th Cir. 1988), to determine whether Petitioner is an arm of the state. The panel concluded that the State of Arizona was not responsible for any monetary judgment against Petitioner GUHSD. The panel also concluded that Arizona's public school system is not subject to centralized state control and, therefore, Petitioner was not performing a centralized government function. After analyzing the remaining factors, the panel held that Arizona eschewed

centralized control of education and Petitioner was not entitled to Eleventh Amendment immunity.

7. Petitioner GUHSD filed a Petition for Rehearing, with Suggestion for Rehearing En Banc, contending, among other things, that Arizona courts recently reaffirmed the concept that any damages resulting from litigation must be funded by the funding mechanism provided by the legislature and that a school district cannot use other funds to pay such damages. The petition was denied.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Decision is Inconsistent with This Court's General Precedent and Contrary to Arizona's Interpretation of Arizona's Enabling Act and Arizona's Constitution.

The concept of State sovereignty, including as it applies to state agencies and instrumentalities, is a fundamental rule of jurisprudence that has an important bearing upon the construction of the United States Constitution. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984). The particular question of whether a state agency or instrumentality is an arm of the state for purposes of Eleventh Amendment immunity is a question of federal law. *Regents of the Univ. of Calif. v. Doe*, 519 U.S. 425, 430 n.5 (1997). This Court's only guidance on this topic as it relates to school districts appeared in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). This Court stated that the issue of whether the Mt. Healthy Board of Education is an arm of the state "depends, at least in part, upon the nature of the entity

created by state law." *Id.* at 279. In finding that the Board was not entitled to immunity, this Court noted that the Board was subject to some guidance from the State Board of Education and received a significant amount of money from the State, but that it had extensive powers to issue bonds and levy taxes.

Since *Mt. Healthy*, renewed interest in school financing reform resulted in multiple lawsuits declaring various states' financing plans unconstitutional. These pronouncements were premised upon the theory that disparities in school district funding violated the state's education provisions as required under their respective enabling acts. *See* Julie K. Underwood & William E. Sparkman, *School Finance Litigation: A New Wave of Reform*, 14 HARV. J.L. & PUB. POL'Y 517, 544 (1991). Arizona was among those states that declared their school financing system unconstitutional pursuant to this premise. *Roosevelt Elementary Sch. Dist. v. Bishop*, 877 P.2d 806, 815-16 (Ariz. 1994). This Court has never provided the circuit courts with definite guidance as to the impact of a State's school financing reform based upon its enabling act and state constitutional provisions on the factors relevant to determine when an entity is an arm of the state for purposes of Eleventh Amendment immunity.

In accordance with *Mt. Healthy*, the Ninth Circuit applied a five-part balancing test adopted in *Mitchell v. Los Angeles Cmty. Coll. Dist.*, 861 F.2d 198 (9th Cir. 1988), to determine whether Petitioner GUHSD is an arm of the state. The Circuit Court applied the following factors: (1) whether the entity performs central government functions; (2) whether a money judgment would be satisfied out of state funds; (3) the corporate status of the entity; (4) whether the entity may sue or be sued; and (5) whether

the entity has the power to take property in its own name or only in the name of the state. *Id.* at 201. The Ninth Circuit's application of those factors in this case is in direct conflict and seriously undermines both the reasoning and result of *Mt. Healthy*. The Ninth Circuit ignored this Court's guidance in interpreting federal law and adopted its own interpretation of Arizona's Enabling Act. "Federal Courts are bound to apply laws enacted by Congress. . . . " *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 (1988). "[F]ederal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own perceptions of prudent public policy." *United States v. Rutherford*, 442 U.S. 544, 555 (1979). Moreover, the Ninth Circuit disregarded the Arizona Supreme Court's pronouncements in *Roosevelt* that realigned the State of Arizona's role in education to correctly reflect the mandates of the Arizona constitution and Arizona Enabling Act. The Ninth Circuit consequentially ignored this Court's pronouncement that a state supreme court's interpretation of its state constitution should be given conclusive effect. *Stearns v. State of Minn.*, 179 U.S. 223, 232 (1900). As a result, despite the exclusive state-control required and the sole responsibility of the State of Arizona to fund public education, Petitioner GUHSD was wrongfully denied Eleventh Amendment immunity.

II. This Court Should Settle the important Federal Question of Whether Arizona Must Exclusively Control its Public School System Pursuant to its Enabling Act.

In analyzing the first *Mitchell* factor, the Ninth Circuit ignored how Petitioner GUHSD is created under Arizona state law as required by Arizona's Enabling Act,

Act of June 20, 1910, c. 310, 36 Stat. 557, 568-579 ("Enabling Act"), and adopted a narrow and erroneous interpretation of the Enabling Act that conflicts with the Arizona Supreme Court's interpretation. On June 20, 1910, the Congress of the United States passed the Enabling Act and admitted Arizona into the Union. The Enabling Act is one of the fundamental laws of the State of Arizona and is superior to the Arizona Constitution, in that neither the constitution nor laws enacted pursuant thereto may be in conflict. *Gladden Farm Inc. v. State*, 633 P.2d 325, 326 (Ariz. 1981). The terms of Arizona's Enabling Act cannot be altered, changed, amended or disregarded without an act of Congress. *Id.* Arizona's Enabling Act marked a complete and absolute departure from the enabling acts of other states admitted to the Union. *Murphy v. State*, 181 P.2d 336, 344 (1947). Because other states dissipated the lands granted by the federal government (including land for the support of public schools), Congress was determined that abuses and scandals would not occur in Arizona. *Id.* As a result, Congress imposed stricter conditions on Arizona compared to other states. *Gladden Farm*, 633 P.2d at 326; *see also*, *Lassen v. Arizona ex rel. Ariz. Highway Dept.*, 385 U.S. 458, 467-68 (1967) (noting that restrictions placed upon land grants to the States became steadily more rigid and specific).

Arizona's Enabling Act required Arizona to adopt a constitution with provisions "for the establishment and maintenance of a system of public schools." *Roosevelt Elem. Sch. Dist. v. Bishop*, 877 P.2d 806, 812 (Ariz. 1994). Section 26 of the Enabling Act also required that Arizona

schools were to be forever under the "exclusive control" of the State.[1] As a result of this congressionally-imposed trust obligation, Arizona enacted Article XI of the constitution to fulfill its promise under the Enabling Act. *Id.*; ARIZ. CONST. art. XI, § 1(A). All of the terms and conditions of the Enabling Act were included as a part of Arizona's Constitution. *Gladden Farm*, 633 P.2d at 326; ARIZ. CONST. art. XX, ¶ 12. Arizona's Supreme Court has interpreted both the Enabling Act (and, consequently, its inclusion into Arizona's constitution) as requiring Arizona to create and exclusively control a public school system. *Roosevelt*, 877 P.2d at 813. ("The enabling act imposed upon the state the responsibility to create and exclusively control a public school system.").

The Arizona Constitution vests the supervision of the Arizona public school system in a State Board of Education and a State Superintendent of Public Instruction. ARIZ. CONST. art. XI, § 2. Petitioner GUHSD is an entity created by the State to fulfill Arizona's trust-obligations and administer the state system of public education. *School Dist. No. 48 v. Rivera*, 243 P. 609, 609 (Ariz. 1926) ("A school district, under our system of government, is merely an agency of the state.").[2] The Arizona Department

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[1] "Exclusive" means "Appertaining to the subject alone, not including, admitting, or pertaining to any others. Sole. Shutting out; debarring from interference or participation; vested in one person alone. Apart from all others, without the admission of others to participate." BLACK'S LAW DICTIONARY 564 (6th ed. 1991).

[2] The *Riveria* Court held that districts were not similar to municipal corporations, but were "purely a state agency." 243 P. at 609. *Cf.*, *Clouse ex rel. Clouse v. State*, 16 P.3d 757, 772 (Ariz. 2001) (noting that school districts are "an arm of the state" entitled to sovereign immunity).

of Education monitors school districts to ascertain that laws are implemented and establishes standards and accreditation for all schools. A.R.S. § 15-239. The legislature has the power to determine compensation, hours, and conditions of employment of school teachers to ensure a uniform system of providing public education. ARIZ. ATT'Y GEN. OP. No. I84-125. Any school district policies that are in conflict with state legislation governing schools are not enforceable. *Bower v. Arizona State Sch. for the Deaf & the Blind*, 704 P.2d 809, 810 (Ariz. Ct. App. 1984). The State Superintendent of Instruction superintends the schools. A.R.S. § 15-251 *et seq*. The legislature recently passed "Arizona LEARNS 2002". A.R.S. § 15-241. This program requires the State Board of Education to adopt an achievement profile formula for public schools that rates school districts based on various factors. A.R.S. § 15-241(F). If a school receives a failing grade for two consecutive years, the State Board of Education then determines whether a governmental, non-profit, or private organization can fully or partially manage the school. A.R.S. § 15-241(V).

Arizona's constitution requires that the State be the preeminent governmental unit responsible for educating Arizona's children. *Roosevelt*, 877 P.2d at 813. These statutes and others[3] establish that the State of Arizona has retained for itself dominant managerial control and overall governance of school districts. *Southern Pac. Co. v. Pima County*, 296 P. 533, 534 (Ariz. 1931) ("legislative

[3] The Arizona statutes regarding state and local governance of Arizona schools are codified at A.R.S. §§ 15-101 to 15-1251 & 15-2001 to 15-2301.

power over school districts is plenary."). The State may have delegated the minor day-to-day activities of schools; however, the State must congressionally and constitutionally retain "exclusive control" over the essential framework and educational functions that cut to the foundation of maintaining a school system.

The Ninth Circuit erroneously concluded that the Enabling Act only referred to Arizona's power to dispose of granted trust lands and that "the Appellant [GUHSD] has cited no cases indicating that the Enabling Act requires the state alone to manage and control the public schools which benefit from the trust lands." *Savage v. Glendale Union High Sch. Dist. No. 205, Maricopa County*, 343 F.3d 1036, 1046 (9th Cir. 2003). As a result, the Ninth Circuit erroneously concluded that the Appellant was not performing a central government function and, consequently, wrongfully denied Petitioner GUHSD Eleventh Amendment immunity. *Id.* (comparing Petitioner to *Eason v. Clark County Sch. Dist.*, 303 F.3d 1137 (9th Cir. 2002), holding that public education was statutorily a matter for local control in Nevada). This Court has never addressed this important federal question: whether Section 26 of Arizona's Enabling Act is limited to Arizona's power to dispose of granted trust lands as interpreted by the Ninth Circuit or whether Section 26 mandates that all public schools in Arizona be exclusively controlled by the State of Arizona as interpreted by the Arizona Supreme Court. If the Ninth Circuit's interpretation is correct, then its decision places into doubt various school reforms enacted since *Roosevelt* based upon the Arizona Supreme Court's interpretation of the Enabling Act. The issue of whether the State of Arizona must exclusively control Arizona's school districts and, consequently, whether Petitioner is

entitled to Eleventh Amendment immunity is of paramount importance to the State of Arizona.

Mt. Healthy did not address this issue because Ohio, like most eastern states included in the original thirteen states, does not have an enabling act addressing issues of school control. *Mt. Healthy*, therefore, stands at one extreme of Eleventh Amendment jurisprudence because of the near local control model in Ohio.[4] Twenty-three western states, including Arizona, were admitted into the Union with various enabling legislation that gave their respective state legislatures various powers over trust land disposal and increasingly greater state control over public schools. *See Murphy*, 181 P.2d at 344. Arizona represents the opposite spectrum to *Mt. Healthy* because of its congressional mandate to exclusively control public schools. Western states incorporated these trust obligations (as they were required to do) into their state constitutions. Eleventh Amendment jurisprudence as it applies to Arizona and the remaining states should be different from *Mt. Healthy* because these states have no authority to deviate from the terms of their enabling act. *Stearns*, 179 U.S. at 244 (enabling legislation becomes a "compact" when State accepts terms and conditions). How these states interpret their enabling acts is an important federal question that needs to be resolved by this Court. State and federal courts must interpret these enabling acts consistent with congressional mandates; otherwise, judicial misinterpretation of trust obligations may result in the squandering of trust lands or a breach of trust obligations

[4] *See Board of Educ. of Cincinnati v. Walter*, 390 N.E.2d 813, 823 (Ohio 1979), for history of local control in Ohio.

should state-created entities like Petitioner GUHSD be wrongfully denied Eleventh Amendment immunity. *See, e.g., Holz v. Nenana City Public Sch. Dist.*, 347 F.3d 1176, 1187 (9th Cir. 2003) (noting that State of Alaska no longer provides education despite Section 6(j) of the Alaska Statehood Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 339, requiring exclusive control of schools by Alaska); *Duke v. Grady Muni. Sch.*, 127 F.3d 972, 979 n.11 (10th Cir. 1997) (holding that State of New Mexico did not have complete control even though Enabling Act requires "exclusive control"). Hence, this Court should grant certiorari in order to settle this important federal question.

Moreover, the Ninth Circuit's interpretation of *Roosevelt* essentially concluded that Arizona relinquished its "exclusive control" over the public school system by delegating some of its responsibility to school districts and, therefore, Petitioner was not a state agency. *Savage*, 343 F.3d at 1051. The mere fact that the State delegated some of its responsibility to local school districts does not alter the fact that, based upon Arizona's Enabling Act and Arizona's Constitution, public schooling is a central governmental function. 68 AM. JUR. 2d *Schools* § 15 ("The state legislature, in order to discharge its constitutional duties to maintain a system of public schools, must employ and delegate its powers to agencies. These agencies usually take the form of school districts.") (citing *Roosevelt*).

The Ninth Circuit's decision directly conflicts with earlier Ninth Circuit decisions, which held that California school districts are entitled to Eleventh Amendment immunity. *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248 (9th Cir. 1992); *Ass'n of Mexican Am. v. State of Calif.*, 231 F.3d 572, 582 (9th Cir. 2000) ("State is so entangled with the operation of California's school district that

individual districts are treated as state agencies for the purposes of the Eleventh Amendment"). In *Belanger*, the Ninth Circuit noted that the California Constitution requires the legislature to provide for a system of common schools and sets forth detailed requirements. *Id.* at 253. The Ninth Circuit also noted that California chose to give local school districts some autonomy. Nevertheless, the *Belanger* Court held that delegation did not mean abdication and concluded that California school districts were performing a central government function. *Id.* ("although the state can assign certain duties with respect to the local operation of schools to local agencies, it cannot by such incidental delegations abdicate its role as the entity ultimately responsible for the proper and lawful functioning of the state's schools.").

With the exact same panoply of facts that existed in this case as in the *Belanger* case, the Ninth Circuit refused to afford Petitioner GUHSD with Eleventh Amendment immunity. The Ninth Circuit's ruling creates an anomalous situation whereby California school districts are granted Eleventh Amendment protection, but equivalently-situated Arizona school districts governed by a stricter enabling act are not. The Ninth Circuit's ruling is contrary to the clear language of Arizona's Enabling Act and is at odds with the Arizona Supreme Court's interpretation of the Enabling Act and the Arizona Constitution. For these reasons, and those set forth below, this Court should grant certiorari and reverse the decision below.

III. The Ninth Circuit's Decision is Contrary to Arizona's Interpretation of Arizona's Constitution that the State is Solely Responsible to fund Arizona's Public Schools.

This Court has held that the most important factor in determining whether an entity is an arm of the state for Eleventh Amendment immunity purposes is whether a monetary judgment would have a practical effect on the state treasury. *See Regents of the Univ. of Calif. v. Doe*, 519 U.S. 425, 430 (1997). In *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 45-51 (1994), this Court indicated that the appropriate inquiry under this factor is whether the state was "practically" or "legally" obligated to pay a monetary judgment against the state instrumentality. This Court examined whether the state entity at issue was structured so that it was self-sustaining or dependent on the state for funding. *Id.* at 261. In *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 93-94 n.3 (1984), this Court considered it relevant that the funding for the state entity came almost entirely from the State.

Congress granted lands to Arizona to hold in its own right in trust for public schools in Arizona. *Forest Guardians v. Wells*, 4 P.3d 1054, 1058 (Ariz. Ct. App. 2000). A significant difference from the enabling acts of other states and Arizona's Enabling Act is that Congress did not designate any individual in any of these twenty-three acts to keep invested funds derived from disposition of granted lands. *Murphy v. State*, 181 P.2d 336, 344 (Ariz. 1947). Section 28 of the Enabling Act originally required that the State deposit the proceeds and rents from these granted lands to a permanent school fund. Arizona enacted section 7 of article 10 as part of its constitution which established a permanent school fund derived from various sources,

including the school trust lands granted by the Enabling Act. ARIZ. CONST. art. X, § 7 & art. XI, § 8. The Arizona Constitution provides that the proper maintenance of such schools shall also be met by taxation imposed by the legislature. ARIZ. CONST. art. XI, § 10.

The Arizona Supreme Court addressed the source of funding for Arizona's public schools in *Roosevelt*. In *Roosevelt*, several parents and school districts sued the State of Arizona, seeking a declaration that the statutory scheme for financing public education violated the Arizona Constitution. The school districts argued that, based upon the constitution, the legislature must finance it by general and special appropriation. The State argued that funding the public school system was not a state responsibility, but the responsibility of the local school districts. 877 P.2d at 813. The Arizona Supreme Court rejected the State's contention. Based upon Arizona's Enabling Act and the constitutional provision to establish and maintain a general and uniform public school system, the Arizona Supreme Court concluded that school districts are not responsible to fund public education:

> We first deal with the state's argument that the financing of public education in Arizona is the responsibility of school districts and not the state. We believe that this proposition is directly refuted by art. XI itself. We look in vain for any provision in the article that imposes any responsibility on school districts to fund public education.

Id. The Court concluded that the State of Arizona solely bears responsibility for funding public schools. *Id.* at 813. The Court held that school districts could "help" finance public education, but that the State could not delegate this

constitutional responsibility to school districts. *Id.* ("It is true that nothing prohibits the legislature from delegating some of its authority to other political subdivisions of the state to help finance public education. But there is nothing in art. XI, § 1 that allows the state to delegate its responsibility under the constitution."). In addressing Arizona's financing system, the Arizona Supreme Court has struck down several reforms and has recommended that in order to comply with Arizona's constitution and the requirements of the Enabling Act, the Arizona legislature should enact a financing system based upon sales taxes, income taxes, a state-wide property tax, or a combination of such taxes. *Hull v. Albrecht*, 950 P.2d 1141, 1145-46 (Ariz. 1997) (holding that ABC Fund legislation was unconstitutional because it improperly delegated to school districts the State's responsibility to maintain adequate facilities).

In determining that the State of Arizona was not liable for any monetary judgments rendered against Petitioner GUHSD, the Ninth Circuit erroneously concluded that the State treasury is shielded from liability because Petitioner can pay a monetary judgment by voter overrides and can, pursuant to A.R.S. § 15-907, petition the county superintendent to request authority to raise property taxes. *Savage*, 343 F.3d at 1041-42. The Ninth Circuit's analysis of the second *Mitchell* factor is directly contrary to and is at odds with the Arizona Supreme Court's interpretation of the State of Arizona's financial responsibilities pursuant to the Enabling Act and the Arizona Constitution. The Ninth Circuit not only misinterpreted Arizona case law, but also focused on Arizona's statutory financing system that the Arizona Supreme Court has declared unconstitutional. *Roosevelt*, 877 P.2d at 815 & 810 n.3 (holding that the capital financing scheme

and the maintenance and operations financing scheme are unconstitutional). The Ninth Circuit erred in doing so because the ultimate interpretation of a statute or constitutional provision is the province of the judicial branch. *Kimel v. Board of Regents*, 528 U.S. 62, 81 (2000); *Marbury v. Madison*, 5 U.S. 137 (1803). This Court has recognized that it is solely within the province of state courts to authoritatively construe state legislation. *U.S. v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 369 (1971); *Stearns*, 179 U.S. at 232. The Ninth Circuit departed so far from the accepted and usual course of judicial interpretation that this Court must exercise its supervisory power and accept review so that Petitioner GUHSD would not be wrongfully deprived of the Eleventh Amendment immunity afforded by *Garrett*.

A. The Decision Conflicts with Earlier Ninth Circuit Case law.

The Ninth Circuit's decision also directly conflicts with Arizona courts' interpretation of its public school financing legislation and previous Ninth Circuit case law. School districts in Arizona are supported by federal, state and local funds. A.R.S. §§ 15-201 to 15-241. The statutory scheme creates an educational formula based upon the school districts' share of the base-level funding needs. Prior to *Roosevelt*, "Under the formula, the cost of public education is allocated as follows: the state (45%), local districts (45%), and the United States and counties collectively (10%)." *Roosevelt*, 877 P.2d at 810. If a school district's required contribution falls short of the predetermined base level, then the *state must make up the difference. Id.* (citing A.R.S. § 15-971(D)). By operation of the Arizona constitution and state statutes, school districts *must* deposit all

monies received with the county treasurer in a commingled account. A.R.S. § 15-341(A)(21). The school district has no other option. A.R.S. § 15-341(A)(21). Monies obtained from the state, federal, and county as well as the district monies for the maintenance and operation of regular education programs are hopelessly commingled and deposited into the Maintenance and Operations Fund. A.R.S. § 15-903(B).

There is no statutory provision authorizing Petitioner GUHSD to issue bonds to satisfy a monetary judgment. The Ninth Circuit erroneously relied upon A.R.S. § 15-907 and completely ignored A.R.S. § 15-381 in concluding that Petitioner could do so. A.R.S. § 15-907 deals specifically with the school district's ability to raise additional monies for unexpected "legal expenses" and not claims and judgments. Claims and judgments are required by statute to be paid by the school district's maintenance and operations fund, which contains commingled state monies. A.R.S. § 15-381(A).[5] Local revenues raised by a school district and lost to any judgment in this case would be supplanted by interchangeable state funds that are already within the Petitioner's budget. Local monies withdrawn from the Petitioner's Maintenance and Operations Fund to pay any judgment in this case would be unavailable for educational purposes and state monies in the Fund would have to cover any critical educational expenses, effectively drawing state

[5] To the extent insurance coverage is available, any judgment in this lawsuit would be paid by insurance proceeds purchased with commingled state funds. App. 91, ¶¶ 11-13 (Eugene Dudo Affidavit filed as Exhibit 1, to Clerk's Index 57). This does not alter the fact that these monies are still state funds. *Doe*, 519 U.S. at 430; *Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1349 (9th Cir. 1981).

monies from other programs to pay the judgment and, in essence, using state monies to pay the judgment. Because more than half of Petitioner's budget comes from state monies (52%) and the local monies are interchangeable with state monies, any money judgment would be satisfied out of state funds.[6]

In *Belanger*, the Ninth Circuit previously observed that if a judgment is paid from a commingled fund, for all practical purposes, the judgment will be paid by State funds and the school district is entitled to Eleventh Amendment immunity. 963 F.2d at 252 ("Moreover, the local character of property tax revenue is lost when it is commingled with state funds under a state controlled revenue limit.").

After analyzing Arizona's financing system, the Ninth Circuit improperly concluded that the State of Arizona was not responsible for money judgments rendered against Petitioner. In distinguishing *Belanger*, the Ninth Circuit noted that, "In *Belanger* we focused on the fact that California has a strict per-pupil funding limit which prevents wealthy districts from raising too much local revenue. . . . " *Savage*, 343 F.3d at 1041-42. The Ninth Circuit improperly concluded that the state guarantees only a minimum amount of pupil spending, not a maximum and that the school district can pay a monetary judgment by raising money through voter overrides. Although the State of Arizona guarantees a base limit of spending, like California's Proposition 13, the State also places limitations on spending above the qualifying tax

[6] App. 91, ¶ 8 (Dudo Affidavit).

rate. A.R.S. §§ 15-944.01, 15-947, 15-947.01, 15-951 (revenue control limit); and 15-971. These statutes provide a general budget "limit" for each school. Thus, the State of Arizona not only sets a "floor" for school district spending, but also a "ceiling".

B. The Decision Conflicts with Arizona Case law.

Additionally, the Ninth Circuit erroneously held that Petitioner may seek additional funds through voter overrides pursuant to A.R.S. § 15-481. Petitioner's ability to raise revenue through voter overrides is severely limited under Arizona law. Petitioner can hold only one budget override election during the fiscal year. *Washington Elem. Sch. Dist. No. 6 of Maricopa County v. Maricopa County*, 30 P.3d 655, 660 (Ariz. Ct. App. 2001). Petitioner can only seek an override if the district's proposed budget exceeds the aggregate budget limit for the budget year. *Id.* The maximum budget increase requested by Petitioner GUHSD cannot exceed 5% of the revenue control limit. A.R.S. § 15-481(K). Moreover, constitutionally, Petitioner cannot become indebted more than 15% of the taxable property in the district. ARIZ. CONST. art IX, § 8. As a final constitutional cap, the maximum amount of all taxes levied from residential property in any tax year (including those levied by a school district) shall not exceed 1% of the property's full cash value. ARIZ. CONST. art IX, § 21(1). Therefore, if a judgment in this case does not result in an increase of the aggregate budget limit, Petitioner cannot even seek an override and, as in *Belanger*, must use commingled state funds to pay the judgment. If there is a large judgment award, even if Petitioner could seek a voter override, the monies raised by any override may not

be enough to pay the judgment because of statutory and constitutional caps.[7]

In addition, under Arizona law such monies do not change their nature into local monies simply because the legislature delegated its constitutional duty to raise the monies. *City of Bisbee v. Cochise County*, 78 P.2d 982, 988 (Ariz. 1938) ("the levying, collection, and use of such tax involves in every particular the rights of the state itself"). The Ninth Circuit's decision directly conflicts with this concept under Arizona law.[8] Their character remains as state monies and the State, therefore, is liable for any judgment against Petitioner GUHSD. Moreover, even if Petitioner could raise funds through bonded indebtedness to satisfy any judgment (it cannot), any bonds issued can be redeemed or refunded by the State. Pursuant to A.R.S. § 35-429(A), upon demand of the proper school authority from the district, the loan commissioners shall provide for redeeming or refunding the Petitioner's bonded indebtedness in the same manner as other State indebtedness and shall issue bonds of the State for any indebtedness authorized by law to be incurred by the Petitioner. A.R.S. § 35-429(B); *Maricopa County v. Osborn*, 125 P.2d 703, 708 (Ariz. 1942). Hence, under Arizona law, there is no difference between the indebtedness of the State and the indebtedness of Petitioner GUHSD. *State of Wash. v.*

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[7] If there is no market for bonds or taxpayers do not approve a voter override, Petitioner is without funding. Based upon its constitutional responsibility under *Roosevelt*, the State must step in. *See* A.R.S. § 15-972 (providing additional state aid beyond equalization).

[8] The decision also directly conflicts with *Belanger*, 963 F.2d at 252 (holding that property tax revenue is no more local than state income taxes generated from the same area because of state control).

Maricopa Cty., 152 F.2d 556, 559 (9th Cir. 1946) (applying statute to county bonds in Arizona).

More importantly, on September 23, 2003, Arizona courts in *Tanque Verde Unified Sch. Dist. No. 13 of Pima County v. Bernini*, 76 P.3d 874 (Ariz. Ct. App. 2003), recently reaffirmed the concept that any damages resulting from litigation must be funded by the funding mechanism provided by the legislature and that a school district cannot use other funds to pay such damages. In *Tanque Verde*, the trial court ruled that school districts that file a condemnation action to acquire the land on which to build a school are not prohibited from paying severance damages resulting from such acquisition. The trial court ruled that the school district could not use funds raised by the state legislature intended to provide "minimum adequate facility standards" for schools throughout the state. The trial court, instead, ruled that school districts must use other funds, such as bonded indebtedness, to pay severance damages. In reversing, the Arizona Court of Appeals held that allowing school districts to fund damages through other means would result in returning Arizona's school financing system to an unconstitutional system that is not "general and uniform." *Id.* at 877-78; *see also*, *Hull v. Albrecht*, 960 P.2d 634, 637-39 (Ariz. 1998) (declaring Students FIRST legislation unconstitutional because it allowed school districts to "opt out" of state funding and pay for its capital needs solely through local financing which contravened a system of general and uniform public-school financing).

The recent *Tanque Verde* case reveals that the Ninth Circuit's decision rests upon an improper legal premise; namely, that under Arizona law Petitioner GUHSD could raise additional monies to pay any judgment. Rather, in

interpreting Arizona's public school financing scheme and Arizona's responsibilities under the Arizona Constitution and the Arizona Enabling Act, Arizona's courts have concluded that only the State of Arizona is financially responsible to fund public schools. Thus, any monetary award against Petitioner GUHSD must be paid by a funding mechanism that reflects the State's responsibility to solely fund public schools in Arizona. The Ninth Circuit's ruling is directly contrary to and is at odds with Arizona's judicial interpretation of the Arizona Constitution and Arizona's public school financing scheme. "The vulnerability of the State's purse [is] the most salient factor in Eleventh Amendment determination", *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994). A review of this case is warranted because this issue affects the ultimate outcome of this case and whether all Arizona school districts, including Petitioner, are entitled to Eleventh Amendment immunity. *Cf.*, *Lords Landing Vill. Condo. Council of Unit Owners v. Continental Ins. Co.*, 520 U.S. 893, 896 (1997). For these reasons, and those set forth below, this Court should grant certiorari and reverse the decision below.

IV. The Ninth Circuit's Decision Creates a Circuit Split in Determining Whether an Entity of the State is Entitled to Receive Eleventh Amendment Immunity.

This Court has never provided the circuit courts with definite guidance as to the impact of a State's school financing reform based upon its enabling act and state constitutional provisions on the factors relevant to determine when an entity is an arm of the state for purposes of Eleventh Amendment immunity. At best, the application of

the arm of the state doctrine for purposes of Eleventh Amendment immunity is admittedly confusing despite its vital importance to federal court jurisprudence. *See Mancuso v. NYS Thruway Auth.*, 86 F.3d 289, 293 (2d Cir. 1996) ("The jurisprudence over how to apply the arm of the state doctrine is, at best, confused."); *Duke v. Grady Muni. Sch.*, 127 F.3d 972, 980 (10th Cir. 1997) (recognizing confusion in the area of Eleventh Amendment jurisprudence). As a result of this lack of guidance, conflict now exists between the Ninth Circuit Court and the Tenth Circuit which has led to an unacceptable, imprecise, and incorrect analysis of when an entity is entitled to Eleventh Amendment immunity. Although both the Ninth Circuit and the Tenth Circuit came to the identical result, the differing circuit court analyses only highlights the glaring inconsistencies.

In rejecting Petitioner's argument that the Enabling Act vested exclusive control of Arizona's public school system to the State of Arizona, the Ninth Circuit relied upon the Tenth Circuit's interpretation of New Mexico's corresponding Enabling Act. *Savage*, 343 F.3d at 1046 (noting that New Mexico and Arizona were admitted into the Union in the same enabling act). The Ninth Circuit stated that the Tenth Circuit considering similar arguments, but determined that although the state of New Mexico has general authority over schools statewide, New Mexico school districts are not arms of the state entitled to Eleventh Amendment immunity because New Mexico school boards have considerable autonomy and control. *Id.* (citing *Duke*, 127 F.3d at 978-79). The Ninth Circuit further stated that the identical Enabling Act provisions affecting New Mexico did not compel the Tenth Circuit to find that education is a centralized governmental function.

Therefore, the Ninth Circuit concluded that Petitioner's argument was similarly unpersuasive.[9] Consequently, Petitioner was wrongfully denied Eleventh Amendment immunity.

Originally, in *Martinez v. Bd. of Educ. of Taos Muni. Sch. Dist.*, 748 F.2d 1393 (10th Cir. 1984), the Tenth Circuit held that New Mexico school districts were entitled to Eleventh Amendment immunity because school districts in New Mexico were arms of the State. The Tenth Circuit found that, based upon the New Mexico Constitution, the State of New Mexico exercised extreme responsibility for the local school systems both as to administration and finances. The Tenth Circuit reviewed the various state agencies that exercised substantial state control over districts and concluded that this responsibility was beyond the "some guidance" provided by the State of Ohio in *Mt. Healthy*. *Martinez*, 748 F.2d at 1394-95 (concluding that New Mexico exercised pervasive control over local school systems).

In *Daddow v. Carlsbad Mun. Sch. Dist.*, 898 P.2d 1235 (N.M. 1995), the New Mexico Supreme Court disagreed with the Tenth Circuit's ruling in *Martinez*. The New Mexico Supreme Court noted that the state legislature had given school boards exclusive power over the employment and discharge of school employees and that the State Board did not have even supervisory control in that area.

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[9] The court's rationale is inconsistent with Arizona case law acknowledging that the Arizona Supreme Court and the New Mexico Supreme Court differ in their interpretation of similar provisions of the Enabling Act. *Gladden Farms*, 633 P.2d at 328. Immunity must be based upon how Arizona law treats Petitioner and not New Mexico law.

The New Mexico Supreme Court also noted that a school district was not designated as a state educational institution under the New Mexico Constitution. From these facts and others, the New Mexico Supreme Court concluded that local school boards were not arms of the State. *Id.* at 1242-43. The New Mexico Supreme Court also held that the New Mexico Constitution and various statutes established that, generally, school district liabilities are not paid directly from state funds. *Id.* at 1242 (citing N.M. CONST. art. VIII, § 7).

In *Duke v. Grady Muni. Sch.*, 127 F.3d 972 (10th Cir. 1997), the Tenth Circuit acknowledged the New Mexico Supreme Court's decision in *Daddow* and essentially adopted its rationale when determining that New Mexico school districts were not entitled to Eleventh Amendment immunity. The Tenth Circuit in *Grady* did not address whether school districts were performing a central government function; i.e., whether it was the State's responsibility to educate New Mexico children. Indeed, the Court did not address any of the arguments proffered by Petitioner GUHSD in this case. The Tenth Circuit, for example, did not address section 8 of New Mexico's Enabling Act[10] requiring that New Mexico public schools shall remain under the exclusive control of New Mexico.[11] In

[10] Sections 1-19 of the Enabling Act refer exclusively to New Mexico; while Sections 20-35 refer exclusively to Arizona.

[11] To date, no court has addressed Section 8 of New Mexico's Enabling Act. New Mexico courts have interpreted the corresponding constitutional provision, N.M. CONST. art. XII, § 3. *Prince v. Board of Educ. of Cent. Consol. Indep. Sch. Dist. No. 22*, 543 P.2d 1176, 1182 (N.M. 1975) ("control" means "control over the curriculum, disciplinary

(Continued on following page)

fact, the Tenth Circuit Court gave deference to the New Mexico Supreme Court's interpretation of its state law. *Id* (quoting *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967), for the proposition that "the State's highest court is the best authority on its own law.").

Other circuit courts give this same deference to a state court's interpretation of state law. *Harter v. Vernon*, 101 F.3d 334, 342 (4th Cir. 1996); *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth.*, 991 F.2d 935, 942 (1st Cir. 1993); *Blake v. Kline*, 612 F.2d 718, 722 (3rd Cir. 1979); *Miller-Davis Co. v. Illinois State Toll Highway Auth.*, 567 F.2d 323, 330 (7th Cir. 1977). Rather than giving deference to Arizona court decisions regarding the legal and financial relationship that the State of Arizona has to Petitioner GUHSD, the Ninth Circuit instead chose to rely upon statutes declared by Arizona courts to be unconstitutional because they did not reflect the State's trust-obligation to exclusively control and solely finance Arizona's public school system. The Ninth Circuit apparently chose to ignore Arizona case law to realize the result it desired that allowed Respondent to pursue her case in federal court. This is improper. *Cf., Tompkins v. City of El Paso*, 449 F.2d 842, 844 (5th Cir. 1971) (stating that it is improper for federal courts to disregard forum state's jurisprudence on subject of sovereign immunity, especially where that jurisprudence does not evidence a trend for positions taken by the court). The Ninth Circuit's approach not only disregards *Mt. Healthy*'s instruction that an entity is entitled to Eleventh Amendment immunity based

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control, financial control, administrative control and, in general, control over all of the affairs of the school.").

upon how the State created the entity, but also disregards this Court's admonition in *Stewart*, 487 U.S. at 27, that federal courts should not interpret legislation in a manner that is in accord with its own perception of public policy. This approach created a split in the circuit as to the deference given to state jurisprudence (especially state jurisprudence involving the implications of school finance reform) when determining whether an entity is entitled to Eleventh Amendment immunity. The need for resolution of this conflict warrants the Court's review of this matter.

CONCLUSION

For the foregoing reason, the Petition for A Writ of Certiorari should be granted. Alternatively, the Court should grant certiorari and summarily reverse.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHELLEY SAVAGE, *Plaintiff-Appellee,* v. GLENDALE UNION HIGH SCHOOL, DISTRICT No. 205, Maricopa County, *Defendant-Appellant.*	No. 02-15743 D.C. No. CV-00-01546-RCB OPINION

Appeal from the United States District Court
for the District of Arizona
Robert C. Broomfield, District Judge, Presiding

Argued and Submitted
February 12, 2003 – San Francisco, California

Filed September 10, 2003

Before: Robert R. Beezer, Sidney R. Thomas, and Richard R. Clifton, Circuit Judges.

Opinion by Judge Thomas

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OPINION

THOMAS, Circuit Judge.

This appeal presents the question of whether an Arizona high school district is an arm of the state entitled to Eleventh Amendment immunity from suit in federal court for alleged violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 & 12203 *et seq.*, and the Rehabilitation Act ("RA"), 29 U.S.C. § 794 *et seq.* We hold that it is not, and affirm the district court.

I

This case arises out of the termination of plaintiff Shelley Savage's employment relationship with defendant Glendale Union High School District ("the School District").[1] Shelley Savage, a disabled individual, was employed by the

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[1] Savage and the School District offer differing accounts of the circumstances surrounding her termination. However, because this case was considered by the district court under a Rule 12(b)(1) motion to dismiss, we assume the material facts alleged in the complaint are true. *See Orsay v. United States Dep't of Justice*, 289 F.3d 1125, 1127 (9th Cir. 2002). Thus, the account of Savage's termination is drawn from her complaint.

School District at Independence High School as an education services technician. The management at the high school informed Savage that she must affix a flagpole to her wheelchair in order to make herself more visible to students in the classroom. She objected to the request, informing the management staff she believed it to be discriminatory. Nevertheless, they continued to require that she comply. When Savage refused to put the flag and flagpole on her wheelchair, the School District terminated her employment. Savage subsequently filed a discrimination charge with the United States Equal Employment Opportunity Commission ("EEOC") and the Arizona Civil Rights Section of the Attorney General's office. The EEOC issued a determination letter, finding reasonable cause to believe that the School District had discriminated against Savage by subjecting her to discriminatory terms and conditions of employment, and then discharging her in retaliation for her opposition to the discriminatory terms. The EEOC then issued Savage a right to sue letter. Savage also received a right to sue letter from the Arizona Civil Rights Section of the Attorney General's office.

Savage filed suit in the United States District Court for the District of Arizona, claiming violations of Title I of the ADA, 42 U.S.C. §§ 12101 *et seq.*, 42 U.S.C. § 12203, Section 504 of the RA, 29 U.S.C. § 794, and the Arizona Civil Rights Act ("ACRA"), Ariz. Rev. Stat. §§ 41-1461 *et seq.* Savage seeks injunctive, compensatory and punitive relief.

The School District filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), arguing that Savage's claims under the ADA and RA are barred by the Eleventh Amendment because the School District is an arm of the state. The School District further argued that if the ADA claims and RA claims are

dismissed, then the district court could not exercise supplemental jurisdiction over the ACRA claims. Both parties supplied affidavits and public documents in support of their positions regarding the motion to dismiss.[2] After reviewing the arguments and documentation and applying the five part test set out in *Mitchell v. Los Angeles Community College District,* 861 F.2d 198, 201 (9th Cir. 1989), the district court concluded that the School District was not an arm of the state and therefore not entitled to sovereign immunity under the Eleventh Amendment. Because the district court determined that it had jurisdiction over the ADA and RA claims, it concluded that the exercise of jurisdiction over the ACRA claims was a proper exercise of supplemental jurisdiction and declined to dismiss them. This appeal followed.

II

Whether a state has sovereign immunity under the Eleventh Amendment presents questions of law which we review de novo. *Carey v. Nevada Gaming Control Bd.,* 279 F.3d 873, 877 (9th Cir. 2002). The existence of subject matter jurisdiction is a question of law which we also

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[2] In evaluating the Rule 12(b)(1) motion to dismiss, the district court considered affidavits furnished by both parties. This is proper because Rule 12(b)(1) attacks on jurisdiction can be either facial, confining the inquiry to allegations in the complaint, or factual, permitting the court to look beyond the complaint. *White v. Lee,* 227 F.3d 1214, 1242 (9th Cir. 2000). Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction. *St. Clair v. City of Chico,* 880 F.2d 199, 201 (9th Cir. 1989).

review de novo. *United States v. Peninsula Communications, Inc.*, 287 F.3d 832, 836 (9th Cir. 2002). The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 & 1367(a). Although the denial of a motion to dismiss is ordinarily not a complete and final judgment subject to appeal, entities that claim to be arms of the State may use the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). Accordingly, we have jurisdiction pursuant to 28 U.S.C. § 1291.

III

It is well established that agencies of the state are immune under the Eleventh Amendment from private damages or suits for injunctive relief brought in federal court. *See, e.g., Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). However, while States are protected by the Eleventh Amendment from suit in federal court, local governments do not enjoy this immunity. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 369 (2001); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890). Because Congress may not abrogate the sovereign immunity of states for suits under Title I of the ADA, Savage may not bring her ADA claims against the School District in federal court if the School District is an arm of the state rather than the local government, as the School District contends. *See Garrett*, 531 U.S. at 360. We conclude that the School District does not fall under the protection of the Eleventh Amendment.

To determine whether a governmental entity is an arm of the state for Eleventh Amendment purposes, we

examine the following factors: (1) whether a money judgment would be satisfied out of state funds; (2) whether the entity performs central governmental functions; (3) whether the entity may sue or be sued; (4) whether the entity has the power to take property in its own name or only in the name of the state; and (5) the corporate status of the entity. *Mitchell v. Los Angeles Cmty. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1989). In making this determination, a court examines the manner in which state law treats the entity. *Id.* (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 280 (1977)). Applying these factors in examining the unique features of California law as it existed at the time, we determined in *Belanger v. Madera Unified School District,* 963 F.2d 248 (9th Cir. 1992), that California school districts are state agencies entitled to Eleventh Amendment immunity. On the other hand, in *Eason v. Clark County School District,* 303 F.3d 1137 (9th Cir. 2002), we applied the *Mitchell* factors and concluded that Nevada school districts are not arms of the state entitled to sovereign immunity. A careful examination of the Arizona statutory scheme demonstrates that Arizona's school districts are more akin to Nevada's than California's and therefore are subject to suit in federal court.

A

Because the impetus of the Eleventh Amendment is the prevention of federal-court judgments that must be paid out of a state's treasury, "[t]he vulnerability of the State's purse [is] the most salient factor in Eleventh Amendment determinations." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994). Accordingly, the first *Mitchell* factor is the most important component in establishing Eleventh Amendment immunity. *Belanger,* 963 F.2d

at 251. After a careful review of the tendered evidence and relevant statutes, the district court concluded that the state of Arizona is not responsible for any money judgment awarded against the School District.

A close examination of Arizona's school funding structure demonstrates that the district court was correct in concluding that the Arizona State treasury would not be vulnerable to a money judgment against the School District. As the district court noted, school districts in Arizona are supported by federal, state and local funds. Federal money is acquired mainly in the form of grants, some of which are paid to the states and then dispersed to individual school districts, others of which are provided directly by the federal government to county treasurers for use by school districts. Ariz. Rev. Stat. §§ 15-206-15-209. The state provides grants for qualifying school districts, and also dispenses state monies in the form of state equalization assistance. Ariz. Rev. Stat. § 15-971. Local monies may come from county assistance and local property taxes. Ariz. Rev. Stat. § 15-971. School districts are also permitted by statute to raise money through bonded indebtedness. Ariz. Rev. Stat. §§ 15-1021 to 15-1032. All these federal, state and local monies go into the maintenance and operations fund ("M & O fund") maintained by the county treasurer. Ariz. Rev. Stat. § 15-996. State and federal grant money must be used only for the purposes for which the grants are awarded. Ariz. Rev. Stat. § 15-210. But other monies in a school district's M & O fund may be used for all the school district's operating expenses, including legal fees, liability insurance, and money judgments.

The School District argues that it is this commingling of funds that renders it an arm of the state, since state monies may be spent on money judgments. Yet as the

district court observed, if mere commingling were enough to bestow governmental agency status upon the School District, then it would also be an arm of the federal government, as well as an arm of the Maricopa County, which contributed $2.3 million to the School District in 1999-2000. Because counties are not arms of the state entitled to Eleventh Amendment immunity, *see Mt. Healthy,* 429 U.S. at 280, by its own commingling argument the School District would be simultaneously entitled to immunity as an arm of the state, and not entitled as a part of the county. Although *Belanger* noted that state and local funds were "hopelessly commingled" in support of its finding that the state would be liable for judgments against California school districts, this was in response to the argument that because some local funds were present in the school district accounts, judgments against the district might have been paid with those rather than state funds. 963 F.2d at 252 n.3. There, we determined that because the state controlled the budget and would be required to make up any budgetary shortfalls encountered by the district, the commingling of funds indicated the state treasury would be vulnerable to a money judgment. *Id.* at 252. Despite the School District's contention, it was not commingling per se that created that vulnerability, but rather the state's unconditional legal obligation to make up a shortfall.

Although the School District argues that the state would be required to make up a deficiency caused by payment of a money judgment, this is not so. State grant monies contained in the M & O fund can only be used for the purposes for which the grants were awarded. Ariz. Rev. Stat. § 15-210. It is true that other monies in the fund, including state equalization funds, would be vulnerable to

a money judgment. However, state equalization assistance is determined based on a strict statutory formula, designed to guarantee a minimum level of support for each school district. *See* Ariz. Rev. Stat. § 15-971. Once the base level of funding for a district is determined, the state subtracts the amount of anticipated property taxes the school district is expected to contribute. The amount remaining, if any, is the amount of equalization assistance provided by the state. *Id.* The state will not provide additional assistance for unexpected operating expenses. *See Roosevelt Elementary Sch. Dist. Number 66 v. Bishop,* 877 P.2d 806, 810 (Ariz. 1994) (noting that the per-pupil amount reached by the strict formula for state equalization assistance was determined by multiplying the number of students in a district by a state-wide dollar amount per pupil, resulting in a sum that appears "unrelated to any amount necessary for basic education"). If a school district spends all of its cash in the M & O fund before the end of the fiscal year, it will not receive additional equalization assistance from the state; the state will not provide additional equalization funds to fund the amount of legal fees or a judgment that exceeds a local school district's budget. Nor will the balance revert to the state if the funds are not spent by the end of the year.

The School District asserts that the situation here is analogous to that in *Belanger,* wherein we determined that money judgments against the school districts would be paid by state funds. In *Belanger,* we focused on the fact that California has a strict per-pupil funding limit which prevents wealthy districts from raising too much local revenue, thus serving to equalize school district budgets throughout the state. 963 F.2d at 251. Although state funds were supplemented by local monies, the funds are

"hopelessly commingled" in a single fund under state control; any local tax revenue lost to a money judgment would then have to be supplemented by interchangeable state funds already in the district budget. *Id.* at 252. Significantly, at the time, California school districts had budgets controlled and funded by the state government rather than by local school districts. *Id.* at 251. The School District claims that state and local funds are commingled in Arizona school districts operating budgets and the state would be required to make up a budget shortfall caused by any money judgments against a school district. Consequently, it argues that the district court erred in determining money paid to Savage would not come from the state treasury. In support, the School District points to language in *Roosevelt* explaining that "[i]f a district's requirement contribution falls short of the predetermined base level, the state makes up the difference," 877 P.2d at 810, as evidence that the state of Arizona, like California, will be responsible for budget shortfalls caused by money judgments. However, *Roosevelt* made this observation in the course of discussing the equalization formula: if the district's contribution of revenue from property taxes falls short, then the state would make up the difference to achieve the base level for the district. But, as the Arizona Supreme Court observed, this had nothing to do with the actual expenditures encountered by the school district; rather, it involved the advance determination of equalization funding a school district would receive, based on its property tax base. *Id.*

In contrast, Arizona has a statutory mechanism for dealing with unexpected legal expenses which cause a school district to exceed its budget. Ariz. Rev. Stat. § 15-907 provides that "[i]n the event of excessive and unexpected

legal expenses . . . the governing board of the school district may petition the county superintendent . . . requesting authority to incur liabilities in excess of the school district budget, in an amount the governing board deems necessary." Notably, the statute provides that such excess liability "shall not be included in the computation of additional state aid for education." Ariz. Rev. Stat. § 15-907(E). Thus, the state treasury is shielded from the liability and the excess revenue raised to cover the liability will not be counted against the school district's contribution when state aid is calculated; therefore, the state's expected contribution to the school district would remain the same, regardless of the payout of money judgments. The school district may also seek additional funds through voter override elections authorizing an increase in property taxes beyond the state-mandated level. Ariz. Rev. Stat. § 15-481.

Amici Arizona School Boards Association and National School Boards Association argue that in the wake of *Roosevelt,* the Arizona school financing system has been overhauled so that it now more closely resembles the California system deemed an arm of the state in *Belanger.* Specifically, they contend that many state controls and funding caps have been instituted in order to comply with the state constitutional mandate to fund the state school system in a "general and uniform manner" such that the school system is now essentially run by the state, and "money judgments against local school districts now necessarily impact the state treasury." They then detail a list of statutes providing for state control and funding of school district capital expenditures, and providing maximum per-pupil limits. However, upon closer examination, their arguments do not alter our conclusion.

As the district court noted, following *Roosevelt,* the state has made changes to the capital financing scheme for state schools by creating the state legislative package known as "Students First." This legislation creates separate funds to address the disparity in the quality of physical facilities among Arizona's local school districts. These are: the New School Facilities Fund, the Building Renewal Fund, and the Deficiencies Correction Fund. In addition, the state created the Soft Capital Fund to permit school districts to purchase short term capital items such as textbooks, equipment, and software. These funds are subject to strict state control and, as the district court properly observed, should be characterized as state funds for the purposes of Eleventh Amendment analysis. Yet these funds are not vulnerable to a money judgment against the school because they can only be used for the capital expenditure purposes prescribed by the state. Ariz. Rev. Stat. § 15-2041(H). Schools may not use these funds for other debts or expenses such as money judgments.

Aside from these changes in the funding for capital expenditures, the public school financing in Arizona is handled as it was prior to *Roosevelt.* Further, unlike California's constitution, Article IX of the Arizona constitution "does not forbid a financing system that allows districts to seek local sources of revenue, such as property taxation, to surpass the state standards." *Hull v. Albrecht,* 960 P.2d 634, 637 (Ariz. 1998) (*Albrecht II*); *see also Hull v. Albrecht,* 1145-46 (Ariz. 1997) (*Albrect I*) ("If a statewide property tax generated capital facilities that met the constitutional standard of general and uniform . . . then districts could be empowered to go above and beyond that without running afoul of the constitution."). Therefore, the M & O funds that would be used to pay a money judgment

to Savage are not subject to state control, are not subject to a *Belanger*-style spending-cap, and will not be replenished with money out of the state treasury.[3]

Thus, the district court correctly concluded that this first factor in the *Mitchell* analysis indicates that the School District is not an arm of the state for Eleventh Amendment purposes. *Cf. Eason,* 303 F.3d at 1143 (finding that the state treasury is not vulnerable to a money judgment in Nevada as it would be in California because the state guarantees only a minimum amount of per pupil spending, not a maximum, and school districts may generate funds in addition to those provided by the state).

B

The second *Mitchell* factor we consider is whether the entity performs central government functions. In analyzing this factor, we assess the extent to which the state

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[3] In support of their argument that state controls and spending caps are analogous to California's, the school boards amici point to Ariz. Rev. Stat. § 15-905, which provides that "no expenditure shall be made and no debt, obligation, or liability shall be incurred . . . in the budget in excess of the amount specified for that item." However, the statute continues "except as provided in § 15-907." As noted previously, § 15-907 provides the mechanism by which liabilities which exceed the budget may be funded with county funds or voter-approved property tax increases. Therefore, unlike California, Arizona has a means by which money judgments against the district may be funded exclusively with local funds. In addition, Arizona provides for voter override of the state-mandated property tax cap. *See* Ariz. Rev. Stat. § 15-481. By contrast, we found in *Belanger* that the *lack* of a mechanism for voter override of property tax caps was significant when determining that the state, rather than the local school district, would be responsible for a money judgment against the school district. 963 F.2d at 251.

exercises centralized governmental control over the entity, in this case, the public education system. *See Belanger,* 963 F.2d at 253 (noting that California had assumed total control over the funding of public schools and "exercises substantial centralized control over other public school decisions.").

Arizona law, like the law of most states, grants local school districts enormous autonomy in the management of public education. School boards are required to (1) manage and control school property in the district, *see* Ariz. Rev. Stat. § 15-341(A)(4); (2) set curricula; *see* Ariz. Rev. Stat. § 15-341(A)(6); (3) establish criteria for high school graduation; *see* Ariz. Rev. Stat. § 15-701.01(B)(2); (4) select either a year-round or traditional school calendar; *see* Ariz. Rev. Stat. § 15-341(A)(2); (5) construct school property, with voter approval; *see* Ariz. Rev. Stat. § 15-341(a)(8); and (6) furnish, repair and insure school property; *see* Ariz. Rev. Stat. § 15-341(A)(7). School boards are also given wide discretion in management of school districts. As we have discussed, Arizona differs from California in that local school districts may raise funds beyond what they receive from the state, and seek voter approval to override state property tax limits.

However, the amici school boards associations point out that the State Board of Education sets statewide standards that the local school boards must implement, arguing that this demonstrates state governmental control. For example, the state board sets uniform statewide courses of study and competency requirements for promotion and graduation of students and controls certification of teachers, Ariz. Rev. Stat. § 15-203; § 15-701; § 15-701.01, approves standardized tests, § 15-741, and prescribes criteria for determining students' English proficiency. Ariz.

Rev. Stat. § 15-756. The amici further argue that Arizona defines on a state-wide basis attendance requirements, circumstances when students may be expelled, and procedures for student discipline.

However, if prescribing minimum standards were the measure of a "central government function," then school districts would doubtless be considered an arm of the federal government, as well, by virtue of such statutes as the No Child Left Behind Act of 2001, Pub.L. 107-110, 115 Stat. 1425, 20 U.S.C.A. § 7231. A closer examination of the statutes cited by the amici reveals that substantial discretion is given to the school board in each of these areas. For example, while the state mandates the contours of the school year, school month, and holidays, § 15-801, school districts retain discretion to decide whether to appoint an attendance officer, § 15-804, (who would be paid out of school district rather than state funds, § 15-805) and to adopt their own policies regarding excuse of pupils from school attendance for religious purposes. § 15-806. The provision for the expulsion of unruly students gives substantial discretion to the School Districts concerning whether or not to expel or readmit a student, whether to admit a student expelled by another educational institution, or whether to reassign a student to an alternative educational program. Ariz. Rev. Stat. § 15-841. The state only mandates that students "shall" be expelled in a few exceptional cases, such as bringing a firearm to school or when the student has been determined to be a threat. *Id.* And the statute prescribing procedures for student discipline provides that "[t]he governing board of any school district shall, in consultation with the teachers and parents of the School District, prescribe rules for the discipline, suspension and expulsion of students," provided

those rules follow state procedural guidelines. Ariz. Rev. Stat. § 15-843.

Additionally, the state grants school districts power to "[p]rescribe and enforce policies and procedures for the governance of the schools" provided they are consistent with state law. Ariz. Rev. Stat. § 15-341(A)(1). For example, local districts can manage and control school property in the district, § 15-341(A)(4), acquire books, supplies and furniture, § 15-341(A)(5), make conveyances of school property, § 15-341(A)(9), prescribe curricula and criteria for promotion and graduation provided it meets state guidelines § 15-341(A)(6), and select textbooks and supplemental textbooks for common schools and high schools. Ariz. Rev. Stat. §§ 15-721 & 15-722.

This system of delegation is more weighted towards localized control than the anomalous centralized California system described in *Belanger.* For example, in *Belanger* we found it significant that the state rather than the local school board exercised control over the textbooks used in public schools. 963 F.2d at 253; *See also* Cal. Educ. Code § 51510 (prohibiting local school boards from disallowing the use of textbooks that have been approved by the state board of education). We also observed that the state government dictated when students may be expelled or suspended. *Belanger,* 963 F.2d at 253. In contrast, while the Arizona state government provides for the expulsion of students, it grants substantially more leeway to local districts than does the corresponding California statute. *Compare* Ariz. Rev. Stat. § 15-841(B) ("A school district may expel pupils for actions other than those listed in this subsection as the school district deems appropriate"), *with* Cal. Educ. Code. § 48900 ("A pupil shall not be suspended from school or recommended for expulsion unless the

superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has: [list of qualifying offenses follows].”). Thus, in general, the Arizona public school system is not subject to centralized state control to the same extent as California’s, and is therefore not performing a centralized governmental function.

The School District also argues that the Arizona Enabling Act establishes the public school system as a central function of the state government. However, this argument is unavailing. The Enabling Act, which conditioned Arizona’s and New Mexico’s admission to the Union in 1910, provided for the grant of lands to the states by the federal government for the support of the common schools. *See* Enabling Act, §§ 24-26, 36 U.S. Stat. 557, 568-579 (1910) (provisions affecting Arizona).

The School District points to language stating that “the schools colleges and universities provided for in this Act shall remain forever under the exclusive control of the said State,” as proof that the highest law in Arizona requires that the state alone may control the public schools. *Id.* at § 26. However, the Arizona Supreme Court has explained that Enabling Act restrictions on the management of trust lands refer to the congressional curb on Arizona’s power to dispose of the lands granted the new state for the schools:

> [Congress] intended the Enabling Act to severely circumscribe the power of state government to deal with the assets of the common school trust. The duties imposed upon the state were the duties of a trustee and not simply the duties of a good business manager. . . . Thus to comply with Congressional intent, we must strictly apply the

> Enabling Acts restrictions regarding the disposal of school trust assets.

Kadish v. Ariz. State Land Dep't, 747 P.2d 1183, 1186 (Ariz. 1988) (prohibiting state from issuing below-true-value mineral leases on land grant property). Likewise, the other cases cited by the School District also deal with restrictions on the state's ability to dispose of trust lands. *See Forest Guardians v. Wells,* 34 P.3d 364, 368 (Ariz. 2001) (holding that Commissioner of State Land Department violated fiduciary duties as trustee by rejecting high bids to lease school trust grazing land); *Gladden Farms, Inc. v. State,* 633 P.2d 325, 330 (Ariz. 1981) (Enabling Act requires that trust lands may only be sold to highest and best bidder at public auction); *Ariz. State Land Dep't v. R.H. Fulton, Inc.,* 577 P.2d 255, 256-57 (Ariz. Ct. App. 1978) (judicial error to limit damages recoverable for wilful trespass on state school trust lands because Enabling Act intended to ensure that trust beneficiaries received the full and only profit form [sic] the disposition of property under the trust). However, the School District has cited no cases indicating that the Enabling Act requires the state alone to manage and control the public schools which benefit from the trust lands.

Further, the Enabling Act provisions regarding granted land and the investment of permanent school funds derived therefrom – which the School District argues demonstrate exclusive state control of education – are identical to the corresponding Enabling Act provisions affecting New Mexico. *See Murphy v. State,* 181 P.2d 336, 340 (Ariz. 1947). Considering arguments similar to those advanced here, the Tenth Circuit determined that although the state of New Mexico has general authority over schools statewide, the fact that school boards have considerable

autonomy and control means they are not arms of the state entitled to Eleventh Amendment Immunity. *Duke v. Grady Mun. Schs.*, 127 F.3d 972, 978-79 (10th Cir. 1997). The identical Enabling Act provisions the School District argues are dispositive here did not compel our sister circuit to find that education is a centralized governmental function. For the reasons noted above, we find the School District's arguments based on the same provisions similarly unpersuasive.

The School District also argues that the Arizona Constitution establishes the public school system as a central function of the state government. Article XI provides that "the legislature shall provide for the establishment and maintenance of a general and uniform public school system." Ariz. Const. art. XI, § 1.A. This, in tandem with the Enabling Act, the School District argues, manifests a constitutional instruction for state rather than local control of the schools. They cite *Roosevelt* for this proposition, arguing that *Roosevelt's* reiteration of the Enabling Act's requirement that "[t]he schools were to be forever under the *exclusive* control of the state," and invocation of Article XI further indicates that schools perform a central governmental function. 877 P.2d at 812 (emphasis in original).

However, *Roosevelt* was concerned with the state's constitutional responsibility to establish and maintain a "general and uniform public school system," a responsibility the Arizona Supreme Court determined the state had been shirking by relying on school districts to fund the state educational system through property tax revenues, which led to great disparities in the school facilities between property-rich and property-poor districts. *Id.* at 808-09, 812. Thus, the Arizona Supreme Court concluded

that while the legislature could delegate "some of its *authority* to other political subdivisions of the state to help finance public education," nothing in the constitution "allows the state to delegate its *responsibility* under the constitution." *Id.* at 813 (emphasis in original). The *Roosevelt* decision led to the establishment of a capital financing scheme that provides state funds for improvements in school facilities.

Yet nothing in *Roosevelt* suggests that actually running the schools is a constitutionally-mandated state function. Throughout the opinion, the Arizona Supreme Court refers to the school districts as entities separate from the state – other "political subdivisions" to which the state has the ability to delegate authority. *See* 877 P.2d at 813. The Court explained:

> As long as the statewide system provides an adequate education, and is not itself the cause of substantial disparities, local political subdivisions can go above and beyond the statewide system. Disparities caused by local control do not run afoul of the state constitution because there is nothing in Art. XI that would prohibit a school district or a county from deciding for itself that it wants an educational system that is even better than the general and uniform system created by the state. Local control in these matters is an important part of our culture.

Id. at 814-15.

Clearly, the Arizona Supreme Court views local school districts and counties as entities that are not subject to the same constitutional obligations or constraints as the state; therefore, they must not be considered to be an arm of the state. And as the district court noted, if the School District

were an arm of the state, it would violate the state constitution if it raised additional funds via the statutory mechanisms provided for school districts because the state itself is prohibited from creating disparities among school districts. *See Albrecht II,* 960 P.2d at 638 ("Financial disparities caused by local control do not run afoul of the state constitution .... [b]ut the general and uniform requirement will not tolerate a state funding mechanism that itself causes disparities between districts.").

Furthermore, subsequent to *Roosevelt, Albrecht I* and *Albrecht II* struck down public school financing legislation in part because it limited local control by school districts. *See Albrecht I,* 950 P.2d at 1145 ("[spending] [c]aps are antithetical to local control and only artificially promote equalization"); *Albrecht II,* 950 P.2d at 638 (striking down state funding provision in part because some districts were "no longer able to employ the historically most important method of securing local funds for school system financing"). Thus, Arizona law attaches particular importance to allowing for local autonomy in managing and funding school districts.

In addition, like Arizona's constitution, Nevada's commands that "[t]he legislature shall provide for a uniform system of common schools." Nev. Const. art. XI, § 2. Nonetheless, in *Eason* we determined that because the state legislature had provided for substantial local control by local school districts, the state "does not treat public schooling as a state-wide or central government function." 303 F.3d at 1143. *Compare* Nev. Rev. Stat. § 386.010(2) (each school district is "a political subdivision of the State of Nevada whose purpose is to administer the state system of public education" – a provision the court found significant), *with* Ariz. Rev. Stat. § 15-101(20) (" 'School District'

means a political subdivision of this state with geographic boundaries organized for the purpose of the administration, support, and maintenance of the public schools or an accommodation school.").

By contrast, although the California constitution contains a constitutional mandate similar to Arizona's and Nevada's directing the state to "provide for a system of common schools," unlike those state constitutions it sets forth detailed requirements for those schools. *See* California Const. art. IX, §§ 5 & 6. Additionally, the California Supreme Court's assessment of the role of local control is very different from Arizona's, as this passage in *Belanger* illustrates:

> The public schools of this state are a matter of statewide rather than local or municipal concern; their establishment, regulation, and operation are covered by the [state] Constitution and the state Legislature is given comprehensive powers in relation thereto.

963 F.2d 248 (citing *Hall v. City of Taft,* 302 P.2d 574 (Cal.1956)). Thus, because of the substantial degree of autonomy given school districts under Arizona law, they are not performing a central governmental function.

C

The third *Mitchell* factor to be considered in our analysis is whether the entity may sue or be sued. Under Arizona law, Arizona school districts are explicitly granted the power to sue or be sued in their own name. *See* Ariz. Rev. Stat. § 15-326(1). This fact was underscored in this litigation by the absence of the Arizona Attorney General's

participation in the lawsuit; it is defended by the School District alone.

The School District concedes that this factor weighs against it, arguing only that the factor is unimportant, citing a similar provision in California law. However, in *Belanger* we explained that this factor still deserves consideration; it is just entitled to less weight than the first two. 963 F.2d at 254. Because in that case, the first two factors weighed in favor of immunity, this third factor was insufficient to offset them in the Eleventh Amendment analysis. Given that here the first two factors indicate the School District is not an arm of the state, the fact that it has the capacity to sue and be sued adds further support to the conclusion that it is not entitled to sovereign immunity.[4] *See also Eason,* 303 F.3d at 1144 (that Nevada school districts have the capacity to sue or be sued "weighs slightly against holding that the District is an arm of the state").

D

The fourth *Mitchell* factor that we consider in immunity analysis is whether the school district has power to hold property in its own name. Arizona school districts are empowered by statute to "[h]old and convey property for

[4] Savage points out that the question of whether the state may itself be legally liable for a suit goes not just to the issue of the vulnerability of the state treasury, but also to the dignity of the sovereign itself. *See Regents of the Univ. of Cal. v. Doe,* 519 U.S. 425 (1997) (finding Eleventh Amendment immunity even when the state would be indemnified by third party for damages award because the state would still be legally liable).

the use and benefit of the district." Ariz. Rev. Stat. § 15-326(2). Additionally, they may furnish, repair and insure school property, § 15-341(A)(7), make conveyances of district property in the name of the district, § 15-341(A)(9), and purchase school sites with voter authorization, § 15-341(A)(10).

The School District contends that new legislative changes in the capital financing of school facilities and capital improvements may have an effect on the School District's ownership and control of property. However, while the new legislation strictly controls the districts' use of monies disbursed for capital improvements, there are no express limitations on the district's subsequent ability to hold, manage or control the property acquired with these funds. *See* Ariz. Rev. Stat. § 15-2041. Thus, while the means and mechanism of acquiring school property has been changed by the new legislation, the districts' power over the property so acquired remains unchanged.

The amici school boards associations contend that although the districts have power to hold title to the property, the state is nevertheless the beneficial owner of the property. *Cf. Belanger,* 963 F.2d at 254 (although school districts can hold property in their own name, "[t]he beneficial ownership of property of the public schools is in the state") (quoting *Hall,* 302 P.2d at 577). In support of this contention they cite *Prescott Community Hospital Commission v. Prescott School District No. 1,* 115 P.2d 160, 161 (Ariz. 1941), which held that "[s]chool districts are created by the state for the sole purpose of promoting the education of the youth of the state. All their powers are given them and all the property which they own is held by them in trust for the same purpose . . . ." Yet this does not demonstrate that the state itself is the beneficial owner of

the property, only that the School District as trustee for the youth of the state cannot give away property for noneducational purposes, as the district in that case had attempted to do. If the state is the beneficial owner of the school property merely because it originally granted the property with restrictions attached, then all grantors of private trusts would also be the beneficial owners of such trusts long after they had relinquished any interest in the property – a result clearly contrary to law.

Therefore, we conclude that the School District's relationship to the school property is more akin to Nevada's in *Eason* than California's in *Belanger.* In *Eason,* we gave considerable weight to the fact that Nevada school districts had the statutory authority to hold, manage, and control school district property, that it had the power to insure school property, and could sell, rent or lease real property belonging to the School District when it was necessary in the best interests of the school. 303 F.3d at 1144. Notably, the fact that the School District could only dispose of the property if it were in the best interests of the school did not make the state the beneficial owner, as amici contend it should. Therefore, because Arizona school districts have the same managerial powers over their property as did the districts in Nevada, this factor also militates against a finding that the School District is entitled to sovereign immunity.

E

The final *Mitchell* factor for our consideration is the corporate status of the entity. Arizona law defines school districts as political subdivisions. Ariz. Rev. Stat. § 15-101(20) (" 'School District' means a political subdivision of

this state with geographic boundaries organized for the purpose of the administration, support, and maintenance of the public schools or an accommodation school."). Political subdivisions are not included in the law's definition of "state." *See* Ariz. Rev. Stat. § 12-348(I)(3) ("'state' means this state and any agency, officer, department, board or commission of this state"); § 12-820(7) ("'state' means this state any state agency, board, commission or department."); § 35-466(6) ("'state' means this state or any of its departments, agencies or authorities."); § 38-842(26) ("'state' means the state of Arizona, including any department, office, board, commission, agency, or other instrumentality of the state."). Furthermore, the statute governing public employee disability programs explicitly distinguishes between the state and political subdivisions. *Compare* § 38-797(13) ("'Political subdivision' means any political subdivision of the state."), *with* § 38-797(14) ("'state' means this state, including any department, office, board, commission, agency, institution or other instrumentality of this state."). The fact that Ohio state law similarly defined school districts as political subdivisions and excluded political subdivisions from the definition of "State" prompted the Supreme Court to conclude that the school district was not an arm of the state. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 280 (1977).

The School District argues that notwithstanding the statutory scheme noted above, Arizona considers school districts to be agencies of the state. However, the cases it cites do not support this contention. *See R.L. Augustine Constr. Co. v. Peoria Unified Sch. Dist. No. 11,* 936 P.2d 554 (Ariz. 1997) (a political subdivision is excluded from the definition of administrative agency; however, its

decisions may still be judicially reviewed to ensure consistency); *Warrington v. Tempe Elementary Sch. Dist. No. 3,* 928 P.2d 673, 675-76 (Ariz. 1996) ("A 'public entity' for purposes of statutory immunity includes the state and any political subdivision of the state. A school district is a political subdivision.") (citation omitted).

Next the School District cites *School District No. 48 of Maricopa County v. Rivera,* 243 P. 609 (Ariz. 1926) as proof that the Arizona Supreme Court considers school districts to be state agencies; in *Rivera,* the Court referred to "school corporations" as both "subdivisions" and "state agenc[ies]," *Id.* at 610. Yet that case concerned the judicially-created state-law doctrine of governmental immunity which extended to both state agencies and political subdivisions alike. *See Stone v. Ariz. Highway Comm'n,* 381 P.2d 107, 110 (Ariz. 1963). Thus, the Court in *Rivera* was not careful to draw a distinction between the state and its subdivisions since both were equally immune from tort liability. This state-law governmental immunity doctrine was subsequently abolished by *Stone.* 381 P.2d at 112.

On the other hand, in *Amphitheater Unified School District No. 10 v. Harte,* 624 P.2d 1281 (Ariz. 1981) the Arizona Supreme Court explicitly considered and rejected the argument that school districts are not political subdivisions, but agents of the state. There, as in the instant case, a school district was sued under the ACRA. Because the statute precludes suits against the state, the school district moved to dismiss claiming that as an agency of the state it was immune from suit. *Id.* at 1282; *see also* Ariz. Rev. Stat. § 41-1481(D) ("the division may bring a civil action against the respondent, other than the state, named in the charge . . . ."). The Arizona Supreme Court rejected

that argument, concluding that the school district was subject to suit because it was "satisfied that the proper classification of school districts is that of political subdivisions of the state." 624 P.2d at 1282. Thus, it appears that in contrast to California, which does not classify its school districts as political subdivisions but rather agents of the state, *see Belanger,* 963 F.2d at 254, Arizona schools are distinct political subdivisions not accorded the same status as state agencies under Arizona law. [5]

Accordingly, because all five *Mitchell* factors indicate that Arizona schools are not agents of the state for Eleventh Amendment purposes, we affirm the district court's decision not to dismiss the complaint for lack of subject matter jurisdiction.

IV

Because the School District does not benefit from sovereign immunity, the district court properly exercised supplemental jurisdiction. Under 28 U.S.C. § 1367(a), if a federal court has original jurisdiction over a civil action, it may exercise supplemental jurisdiction over state law claims that "are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Here, the same facts and circumstances that form the basis for Savage's claims under the ADA and RA support her ACRA claim. Therefore, supplemental

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[5] Notably, the School District's 1999-2000 Support Staff Guide states in its preface "[t]he Glendale Union High School District is governed by citizens from your school community – a local government."

jurisdiction is proper because the School District does not have sovereign immunity and the district court has jurisdiction over the federal claims.

V

Most communities value local control of their schools. Like most states, Arizona has chosen to vest the control of school districts in local school boards. However, when a state eschews centralized state control of education, it cannot cloak itself in the immunities afforded the state. Therefore, local school boards in Arizona cannot invoke the protection of the Eleventh Amendment to immunize themselves from appropriate lawsuits in federal court. We affirm the judgment of the district court.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Shelley SAVAGE, Plaintiff, vs. GLENDALE UNION HIGH SCHOOL DISTRICT NO. 205 of Maricopa County, Defendant.	No. CIV 00-1546 PHX RCB ORDER (Filed Mar. 20, 2002)

Defendant, Glendale Union High School District No. 205 of Maricopa County (GUHSD), has moved to dismiss Plaintiff Shelley Savage's Complaint for lack of jurisdiction. Defendant's Mot. to Dismiss (doc. #33). GUHSD claims immunity under the Eleventh Amendment. Savage strongly disputes GUHSD's claim. Additionally, Savage has filed a motion to strike footnote thirteen of GUHSD's supplemental reply. Plaintiff's Mot. to Strike New Argument in Def.'s Suppl. Reply in Supp. of Def.'s Mot. to Dismiss (doc. #68). After carefully considering the extensive briefing provided by the parties and conducting a hearing, the Court now rules on these motions.

I. FACTUAL BACKGROUND

For purposes of a motion to dismiss, all material facts alleged in the Complaint are accepted as true. *Plaine v. McCabe*, 797 F.2d 713, 723 (9th Cir. 1986). Therefore, the facts for purpose of this motion are as follows:

Shelley Savage was employed by GUHSD as an educational services technician in the computer lab at

Independence High School. First Amend. Compl. (doc. #53) ¶ 12. The high school management staff requested that Savage place a flag and flagpole on her wheelchair. *Id.* ¶ 13. Savage objected to the request as discriminatory and refused to comply. *Id.* ¶ 14. Thereafter, her employment was terminated. *Id.* ¶ 16. Savage has filed this lawsuit against GUHSD claiming violations of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12203, section 504 of the Rehabilitation Act (RA), 29 U.S.C. § 794, and the Arizona Civil Rights Act (ACRA), A.R.S. §§ 41-1463-64. Savage seeks injunctive, compensatory, and punitive relief against GUHSD.

II. DISCUSSION

GUHSD has submitted a motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). GUHSD first argues that Savage's claims under the ADA and RA should be dismissed because she is barred from litigating them in federal court under the Eleventh Amendment. Without discussion GUHSD summarily claims to be an arm of the state, entitled to Eleventh Amendment immunity. Defendant's Mot. to Dismiss (doc. #33) at 4-5. GUHSD goes on to explain in great detail why this immunity has not been properly abrogated by Congress. *Id.* at 5-12. GUHSD then contends that after the ADA and RA claims are dismissed the Court cannot exercise supplemental jurisdiction over the ACRA claim. *Id.* at 12-13. Finally, GUHSD maintains that if Savage is allowed to go forward with her claims, she is statutorily barred from recovering any punitive damages under the ADA, RA, or ACRA. *Id.* at 13-16.

Savage responds to GUHSD's motion by arguing that GUHSD has not proven that it is entitled to Eleventh Amendment immunity. Plaintiff's Resp. to Def.'s Mot. to Dismiss (doc. #46) at 3. Savage argues that GUHSD is a local governmental unit and not entitled to Eleventh Amendment protection. *Id.* at 4-16. Alternatively, Savage reasons that if GUHSD is an arm of the state, it waived its Eleventh Amendment immunity under the RA by accepting federal funds. *Id.* at 17-21. In the event the Court dismisses Savage's federal law claims, she argues that the Court can still exercise supplemental jurisdiction over her ACRA claim based on the discretionary provisions of 28 U.S.C. § 1367. *Id.* at 21-22. Savage concludes by conceding that punitive damages are not available against a public entity under the ADA and the ACRA, but insists that the RA does allow Savage to seek punitive damages from GUHSD. *Id.* at 22-24.

GUHSD's reply argues extensively that GUHSD is an arm of the state and entitled to Eleventh Amendment immunity. Defendant's Reply in Supp. of Def.'s Mot. to Dismiss (doc. #57) at 3-26. To further support this claim GUHSD provides the Court with the affidavit of Eugene Dudo, Assistant Superintendent for Finance with GUHSD. *Id.* at Ex. 1. GUHSD then argues that a recently decided case from the District of Arizona, *Pugliese v. Arizona Department of Health and Human Services*, 147 F. Supp. 2d 985 (D. Ariz. 2001), concluded there is no waiver of Eleventh Amendment immunity under the RA for merely accepting federal funds. Defendant's Reply in Supp. of Def.'s Mot. to Dismiss (doc. #57) at 26-29. GUHSD then advances the argument that Savage's ACRA claim is also barred by the Eleventh Amendment. *Id.* at 29-32. Lastly, GUHSD contends that there can be no punitive damages against a public entity under the RA. *Id.* at 32-35.

After reviewing these arguments, the Court granted a joint motion to permit further briefing on Defendant's motion to dismiss. Order (doc. #58). Thereafter, Savage and GUHSD filed a supplemental response and reply, respectively. Plaintiff's Suppl. Resp. in Opp'n to Def.'s Mot. to Dismiss (doc. #61); Defendant's Suppl. Reply in Supp. of Def.'s Mot. to Dismiss (doc. #66). These supplemental briefs expounded the arguments described above. In addition, Savage included the affidavit of Charlotte D. Borcher, a school finance and administrative consultant, and several reports from the Arizona Department of Education detailing the state aid allocated to selected school districts. Plaintiff's Suppl. Resp. in Opp'n to Def.'s Mot. to Dismiss (doc. #61) at Exs. 1 and 2.

On November 14, 2001, just a few days before the Court was to hear oral argument on Defendant's motion to dismiss, the Ninth Circuit handed down a ruling in the case of *Douglas v. California Department of Youth Authority*, 271 F.3d 812 (9th Cir. 2001). That case addressed the issue of waiver of Eleventh Amendment immunity under the RA and criticized the decision in *Pugliese*. The parties agreed to continue the hearing and the Court allowed additional briefing on the impact of the *Douglas* case on Defendant's motion to dismiss.

A. Motion to Strike

Savage has filed a motion to strike footnote thirteen of GUHSD's supplemental reply. Plaintiff's Mot. to Strike New Argument in Def.'s Suppl. Reply in Supp. of Def.'s Mot. to Dismiss (doc. #68) at 1. This footnote argues that accepting federal funds not intended to specifically advance the purposes of the RA is insufficient to constitute a

waiver of Eleventh Amendment immunity. Def.'s Suppl. Reply in Supp. of Def.'s Mot. to Dismiss (doc. #66) at 30 n.13. Savage moved to strike this argument because it was raised for the first time in GUHSD's supplemental reply and Savage was not given the opportunity to respond. Since the motion to strike was filed both parties have been permitted further briefing on the issue of waiver of Eleventh Amendment immunity and Savage has responded to GUHSD's argument; therefore, there is no longer any basis for striking the footnote.

B. Motion to Dismiss

1. Eleventh Amendment Immunity

The Eleventh Amendment to the Constitution of the United States reads: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Although the language of the Amendment refers to suits by citizens of another State, it has been interpreted by the Supreme Court to include suits by a State's own citizens as well. *Hans v. Louisiana*, 134 U.S. 1 (1890). It has been held that the Eleventh Amendment confers upon the States immunity from suit in federal court unless the State waives its immunity or Congress properly abrogates immunity pursuant to enforcement powers granted by the Fourteenth Amendment. *Seminole Tribe v. Florida*, 517 U.S. 44, 54-59 (1996).

While the Eleventh Amendment protects States from suit in federal court, local governments are not immune. *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890). In

order to qualify for immunity under the Eleventh Amendment, GUHSD must prove that it is an arm of the state. *ITSI TV Prods., Inc. v. Agricultural Ass'ns*, 3 F.3d 1289, 1292 (9th 1993).

Whether an entity is an arm of the state, or a county or similar municipal corporation not entitled to Eleventh Amendment immunity "depends, at least in part, upon the nature of the entity treated by state law." *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 279 (1977). In accordance with *Mt. Healthy*, the Ninth Circuit has instituted a five factor test to determine whether an entity is an arm of the state, or a local government unit. The Court must examine the following five factors in light of Arizona law:

> [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs a central governmental function, [3] whether the entity may sue or be sued, [4] whether the entity has power to take property in its own name or only the name of the state, and [5] the corporate status of the entity.

Mitchell v. Los Angeles Cmty Coll., 861 F.2d 198, 201 (9th 1989).

a. Money Judgment Satisfied Out of State Funds

The first factor of the *Mitchell* test is whether a money judgment would be satisfied out of state funds. *Id.* The "vulnerability of the State's purse [is] the most salient factor in Eleventh Amendment determinations." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994). Consequently, the first *Mitchell* factor is recognized as the most important component in establishing Eleventh

Amendment immunity. *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 251 (9th Cir. 1992).

i. Arizona Public School Financing System

In order to determine who will be responsible for paying a judgment in this case, the Court must first establish how GUHSD is funded. This is done by examining the current public school financing system for Arizona.

The financing system for the public schools in Arizona is extremely complex. Therefore, the Court has relied upon the affidavits provided by the parties from individuals who are intimately acquainted with the system. *See* Affidavit of Eugene Dudo *in* Defendant's Reply in Supp. of Def.'s Mot. to Dismiss (doc. #57) at Ex. 1 [hereinafter "Dudo Aff."]; Affidavit of Charlotte D. Borcher in Supp. of Pl.'s Suppl. Resp. to GUHSD's Reply *in* Plaintiff's Suppl. Resp. in Opp'n to Def.'s Mot. to Dismiss (doc. #61) at Ex. 1 [hereinafter "Borcher Aff."]. The Court has also referred to the case of *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 179 Ariz. 233, 877 P.2d 806 (1994), an Arizona Supreme Court case centering around the Arizona school financing system.[1] Based on these sources and a review of the relevant Arizona statutes the Court has been able to acquire a modest but sufficient understanding the Arizona public school financing system.

School districts in Arizona are supported by federal, state, and local funds. *See* Borcher Aff. ¶ 6; Dudo Aff. ¶¶ 2,

[1] The Court has kept in mind, however, that changes to the Arizona school financing system have occurred because of the *Roosevelt* decision.

4-7. These funds come to the school district in many ways. Federal money comes mainly in the form of grants, some of which are acquired by the state and dispersed to the individual districts. A.R.S. §§ 15-206 to 15-209; Brocher [sic] Aff. ¶ 25. The state provides grants for qualifying school districts as well. Dudo Aff. ¶ 7 (GUHSD received $8 million dollars in state and federal grants in the 1999-2000 fiscal year). The school districts also receive state money in the form of state equalization assistance. A.R.S. § 15-971; Borcher Aff. ¶ 16; Dudo Aff. ¶ 5 (GUHSD received $32.8 million in state equalization assistance in 1999-2000). School districts are also funded by county assistance and local property taxes. A.R.S. § 15-971; Borcher Aff. ¶¶ 8-9, 15; Dudo Aff. ¶¶ 2-4, 6 (GUHSD received $2.3 million from Maricopa County and collected more than $23 million in property taxes in 1999-2000). In addition, there are statutory provisions that allow school districts to raise money through bonded indebtedness. A.R.S. §§ 15-1021 to 15-1032.

This money goes into a general fund, also known as a maintenance and operations fund (M&O fund), maintained by the county treasurer. A.R.S. § 15-996; Brocher Aff. ¶ 18; Dudo Aff. ¶ 9. Grant money must be used only for the purposes for which the grants are awarded. A.R.S. § 15-210. The other monies in the school district's M&O fund are used for all of the district's general operating expenses, including legal costs, liability insurance, and money judgments. Brocher Aff. ¶ 40; Dudo Aff. ¶¶ 12-14.

Each school district in the state receives a different amount of state assistance, and that amount changes from year to year. *See* Plaintiff's Suppl. Resp. in Opp'n to Def.'s Mot. to Dismiss (doc. #61) at Ex. 2. The amount of state equalization funds a school district receives is determined

by a complex formula. *See* A.R.S. § 15-971. In the simplest terms, state equalization assistance is based on a guaranteed minimum support level for each school district that is determined by a series of calculations. A.R.S. §§ 15-941 to 15-964. Once the base level funding for a district is determined the state subtracts the amount of anticipated property taxes the school district is expected to contribute based on the state's qualified tax rate. A.R.S. § 15-971. The amount remaining is the level of equalization assistance provided by the state. If a school district can meet its base funding level through property taxes then it will not receive any state equalization funds.[2]

As described above, the amount of state equalization assistance is based on fixed statutory formula. The state does not provide additional assistance for unexpected expenses such as unanticipated legal fees or money judgments. *See Roosevelt*, 179 Ariz. at 237, 877 P.2d at 810 (noting that the state set funding level appears to be arbitrarily set and is "unrelated to any minimum amount necessary for a basic education"). If a school district cannot meet its expenses the district must petition the county for permission to exceed its budget and must repay that amount the next fiscal year. A.R.S. § 15-907. Additional revenue must be raised through bonded indebtedness or

[2] As a very simplified example, suppose that a school district's base-level funding was calculated at $10,000. Suppose that same school district could generate $5,500 in property taxes, based on the state qualified rate. The school district in this example would be entitled to $4,500 in state equalization assistance. However, if we were to suppose that the same school district could generate $12,000 in property taxes based on the qualified rate, the district would not be entitled to any state equalization funds.

increased property taxes, approved by the voters. A.R.S. §§ 15-481 and 15-491.

Recent litigation in the state of Arizona over the educational funding scheme for the state has led to several changes in the financing of school facilities and capital improvements. In *Roosevelt Elementary School District No. 66 v. Bishop*, 179 Ariz. 233, 877 P.2d 806 (1994), the Arizona Supreme Court determined that the statutory financing scheme relied too heavily on local property taxes, creating wide disparities in the capital facilities among the state's school districts. Because the system created and perpetuated these disparities, the Court held that the public school financing system violated the Arizona Constitution. *Id.* at 243, 816.

As a result of *Roosevelt*, the Arizona legislature has made changes to the capital financing scheme for state schools. The legislature, with the approval of the voters, increased the state sales tax and dedicated a portion of these funds to immediate capital improvements. Some of this money was given to the school districts to fund other needed educational programs unrelated to capital improvements. *See* Plaintiff's Suppl. Resp. in Opp'n to Def.'s Mot. to Dismiss (doc. #61) at Ex. 2, Attach. Y. The state Legislature also passed the revised Student First legislation that creates several funds that are controlled by the state through the state appointed capital facilities board. A.R.S. §§ 15-2001 *et seq.* These funds are dispersed to school districts for the sole purpose of making capital improvements and building and maintaining adequate facilities according to a state declared minimum standard. *See* Borcher Aff. ¶¶ 26-38 (describing how the various capital funds are administered by the state).

As per the *Roosevelt* decision and the follow-up cases of *Hull v. Albrecht*, 190 Ariz. 520, 950 P.2d 1141 (1997) [hereinafter *Albrecht I*], and *Hull v. Albrecht*, 192 Ariz. 34, 960 P.2d 634 (1998) [hereinafter *Albrecht II*], school districts are free to spend beyond the state funded minimum if they are capable of raising additional revenue. There are currently no pending constitutional challenges to this new financing scheme. *See Hull v. Albrecht*, No. CV-98-0238-SA (Ariz. July 20, 1998) [hereinafter *Albrecht III*] (dismissing the state constitutional challenge to the revised Student First legislation).

ii. State liability for money judgments

Based on the current Arizona school financing system the Court concludes that the state is not responsible for a money judgment against GUHSD. The state's purse is not vulnerable in this case because the state funding level to GUHSD is fixed by factors unrelated to liability or need. State aid to GUHSD will not be increased to pay a money judgment. If GUHSD needs additional funds to meet its expenses they must be obtained from the county or from local voters through increased property taxes. While it is true that the state sets the qualified property tax rate, the district can still increase revenues through an override election. Therefore, the state treasury is not required to satisfy a judgment against GUHSD.

GUHSD's arguments to the contrary are unavailing. GUHSD argues that a judgment would be paid out of state funds because the state monies are "hopelessly comingled" with other district revenues. Def.'s Reply in Supp. of Def.'s Mot. to Dismiss (doc. #57) at 14. However, the fact that the state contributes to GUHSD's budget cannot make it an

arm of the state. If this Court were to accept such an argument it would also have to conclude that GUHSD is a branch of the federal government, as well as a department of every business, and a member of each family owning property in the district, because these entities also contribute to GUHSD's budget. Even more confusing, GUHSD would also have to be considered a part of Maricopa County, which contributed $2.3 million dollars to GUHSD in 1999-2000. Counties are not arms of the state and are not entitled to Eleventh Amendment immunity. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). Thus, by the same argument GUHSD is both entitled to Eleventh Amendment immunity as an arm of the state and not entitled to Eleventh Amendment immunity as part of the county. Such an analysis gets the Court nowhere. It is rather like a dog running around in endless circles chasing its own tail.

State funds in GUHSD's budget do not leave the state treasury vulnerable to a money judgment. While some of the money in GUHSD's M&O fund originates from the state treasury, once it is in the hands GUHSD, the state no longer has control over that money. The state fulfills its statutory obligation by advancing a fixed amount of equalization assistance. That money then loses its state character because the state no longer controls the money and the district can make no further demands on the state for additional funding.

This fact is emphasized by comparing state aid with the new capital financing system. That system gives a state board control over how the money is spent and continues to advance money to the school districts until educational facilities are up to par. In the case of capital facilities the money does not lose its state character

because the state continues to control the funds and the statutory scheme requires the state to continue to put money into the system until a certain result is achieved. These are state funds; however, because they can only be used for capital expenses, GUHSD can make no claim on them to satisfy a judgment in this case.

GUHSD further argues that revenues generated through property taxes are actually state funds. This contention is based on language in the *Belanger v. Madera Unified School District*, 963 F.2d 248, 252 (9th Cir. 1992). However, GUHSD's reliance on *Belanger* is misplaced. The Belanger court relied heavily upon the fact that California imposes a revenue limit on all school districts. It was this absolute ban on individual school districts spending beyond a state mandated level and the state's "complete control over the amount of property tax revenue that the district receives," that led the *Belanger* court to conclude that "property tax revenue allocated to the public school revenue limit program is state money collected for a state purpose." *Id.*

In contrast, the Arizona Supreme Court has concluded that the state cannot limit spending by individual school districts. "[T]he [Arizona] constitution does not forbid a financing system that allows districts to seek *local sources of revenue, such as property taxation*, to surpass state standards." *Albrecht II*, 192 Ariz. at 37, 960 P.2d at 637 (emphasis added). Far from being state funds, GUHSD's property tax revenues are the "key to local control.' *Albrecht I*, 190 Ariz. at 523, 950 P.2d at 1144.

GUHSD also suggests that the increase in state sales taxes would go to fund a money judgment. This assertion essentially reiterates the argument that comingled funds

equal state funds. The analysis is the same. GUHSD receives the same amount of money from the sales tax increase regardless of whether a money judgment is levied against it and the state sales tax will not be further increased if GUHSD is held liable. Therefore, the state purse is not compromised by a money judgment against GUHSD.

Finally, GUHSD petitions the Court to not penalize it because "the Arizona legislature has failed to enact a constitutionally-adequate financing system." Def.'s Reply in Supp. of Def.'s Mot. to Dismiss (doc. #57) at 19. First, the Court notes that GUHSD has not pointed to any pending constitutional challenges to the present state school financing scheme. Moreover, even if such litigation were pending, the Court would still have to reject GUHSD's petition. Eleventh Amendment immunity is based on the law as it is, not as it may be or even should be. The Court will not speculate on the form of future Arizona school funding measures. The Court must determine what entity is responsible for paying a money judgment against GUHSD as the law currently stands, and that entity is not the State of Arizona.

b. Central Governmental Function

This factor asks whether functions performed by GUHSD are part of the central governmental functions of the State or whether they are performed independent of the State. GUHSD tries to turn this factor into a broad notion of statewide concern for education. Def.'s Suppl. Reply in Support of Defendant's Mot. to Dismiss (doc. #66) at 5. Such a test would be far too encompassing. It would make any entity that participates in education, including

counties, municipalities, and private citizens, an arm of the State. It is clear from *Belanger* that such a broad interpretation of this factor was not intended by the Ninth Circuit. In its discussion of this factor the *Belanger* court emphasized over and over again that central governmental function means centralized state control. *Belanger*, 963 F.2d at 253 ("California has assumed *total control* over the funding of public schools. . . . California exercises *substantial centralized control* over other public school decisions. . . . [T]he state exercises *control* over the textbooks that are used. . . . [T]he management of public schools in California is a matter of *statewide supervision*. . . . [The state is] the entity *ultimately responsible* for the proper and lawful functioning of the state's schools." (emphasis added)). Thus, the Court must focus on whether GUHSD's activities are under the State government's control.

The more particular question for the Court is whether GUHSD performed a central governmental function when it fired Savage for not placing a flag on her wheelchair. Clearly, the answer is no. GUHSD's governing board is the only body authorized by State law to make employment decisions for the schools within its boundaries. A.R.S. § 15-502. The State does not control such decisions. Members of the board are not appointed by the State. A.R.S. § 15-428 (setting forth the method of electing the school board for union high school districts). There is no process for appealing the board's employment decisions to the State.[3]

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[3] In certain circumstances school district employees are entitled to a hearing before dismissal as a requirement of due process. This process is set forth in A.R.S. §§ 15-539 to 15-543. The governing board of the local school district makes the final decision. Any appeal of the

(Continued on following page)

A.R.S. § 15-543.

The state does license many employees hired by GUHSD, notably teachers. This does not, however, amount to state control of GUHSD's employment activities.

Even looking at the broader function of education it is clear that GUHSD acts independently of the State in the sphere it has been given by State law. Although the State Board of Education prescibes [sic] general educational policy, GUHSD has extensive powers over public education that are not controlled by the state. Foremost among these powers is GUHSD's discretion in budgeting and its ability to raise funds beyond what it receives from the state.[4] *See supra* Part III.A.1. GUHSD also has power to select textbooks, prescribe curricula, discipline students, teachers, and administrators, expel students, review the promotion or failing of students, assess fees for activities and books, and much more, all without state control. A.R.S. §§ 15-341 and 15-342.

GUHSD argues that, according to the Arizona Supreme Court in *Roosevelt*, it cannot act independently from the state because education was "to be forever under the *exclusive* control of the state."[5] 179 Ariz. at 239, 877 P.2d

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board's decision must be directed to the courts. There is no provision for an appeal of school district employment decisions to any state administrative agency.

[4] If GUHSD were an arm of the state it would be unconstitutional for it to raise additional funds. *Roosevelt*, 179 Ariz. at 242, 877 P.2d at 815 (holding that state financing cannot be the cause of disparities among schools).

[5] This statement in the opinion is based on a misquotation of Section 26 of the Enabling Act for the state of Arizona. That section

(Continued on following page)

at 812. The Arizona Supreme Court, however, made it clear in *Albrecht I and II* that Roosevelt's rhetoric was more expansive than its ruling. These two cases struck down public school financing legislation because they limited local control by the school districts. *Albrecht I*, 190 Ariz. at 524, 950 P.2d at 1145 ("Caps are antithetical to local control and only artificially promote equalization); *Albrecht II*, 192 Ariz. at 38, 960 P.2d at 638.

Moreover, *Roosevelt* itself does not require the elimination of school districts or suggest that they are or must be centralized and controlled by the state. Throughout the opinion, the Arizona Supreme Court referred to school districts as entities separate from the state. They were consistently characterized by the court as political subdivisions under local, rather than state control. *See Roosevelt*, 179 Ariz. at 238, 240, 242, 877 P.2d at 811, 813, 815. *Roosevelt*, also stated that "[l]ocal control in these matters is an important part of our culture" and "[t]here is nothing unconstitutional about creating school districts." *Roosevelt*, 179 Ariz. at 242, 877 P.2d at 815. Therefore, GUHSD represents the type of local control advocated by the Arizona Supreme Court. From the foregoing, the Court concludes that GUHSD does not perform central governmental functions of the state.

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states that the public schools are to be under the "*executive* control" of the state (emphasis supplied). This phrasing suggests general supervision rather than centralized control, and is consistent with the history of local school districts pre-dating statehood. *Roosevelt*, 179 Ariz. at 238, 877 P.2d at 811.

c. Sue or Be Sued

GUHSD can sue and be sued under Arizona law. A.R.S. § 15-326(1). GUHSD argues, however, that this factor is of minimal importance. It points to *Belanger v. Madera Unified School District*, 963 F.2d 248 (9th Cir. 1992), in which the Ninth Circuit determined that California school districts could sue and be sued and yet held that they were still entitled to Eleventh Amendment immunity based on the more important factors of state funding and central government function. *Id.* at 254. In the present case the first two factors of state funding and central government function weigh heavily against a finding of Eleventh Amendment immunity. The fact that GUHSD can sue and be sued in its own name is yet further proof that GUHSD should not be granted Eleventh Amendment immunity.

d. Power to Take Property in Its Own Name

GUHSD's power to take property in its own name or only in the name of the state cannot be determined with any certainty at this time. The law of Arizona gives a school district the right to acquire, sale, and hold property in its own name. A.R.S. §§ 15-326(2) and 15-341(9)-(12). However, state law has recently created a new program that centralizes the financing of school facilities and capital improvements. A.R.S. §§ 15-2001 *et seq.*; *see also* Borcher Aff. ¶¶ 26-38. What effect this new legislation has or will have on the school districts' ownership or control of property is uncertain. Even assuming that GUHSD's power to take property in is own name has been diminished by recent legislation, this alone is insufficient to support GUHSD's claim to Eleventh Amendment immunity. *Belanger*, 963 F.2d at 254.

e. Corporate Status

Under Arizona law school districts are defined as "political subdivisions."[6] A.R.S. § 15-101(20). Arizona law does not include "political subdivisions" in its definitions of the "State." *See* A.R.S. §§ 12-348(I)(3), 12-820(7), 35-466(6), 38-711(30), 38-797(14), and 38-842(26). This same fact motivated the Supreme Court to hold that Ohio school districts are not entitled to Eleventh Amendment immunity. *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 280 (1977) ("Under Ohio law the 'State' does not include 'political subdivisions,' and 'political subdivisions' do include local school districts.").

GUHSD's argument that this factor is inapposite is based on the erroneous assertion that school districts in Arizona have, on different occasions, been treated as both state agencies and political subdivisions.[7] All the cases GUHSD points to, save one, clearly and consistently address Arizona school districts as political subdivisions and not agencies of the state. *Warrington v. Tempe Elementary Sch. Dist. No. 3*, 187 Ariz. 249, 251-52, 928 P.2d 673, 675-76 (Ct. App. 1996) ("A 'public entity' for purposes of statutory immunity includes the state and any political

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[6] In its briefs, Savage argues that school districts are more kin to counties than to the State for purposes of Eleventh Amendment immunity. The law of Arizona clearly declares the corporate status of school districts; therefore, the Court does not consider it necessary to examine how closely school districts relate to counties.

[7] The Court notes that GUHSD may be estopped from disputing its corporate status because of representations made in its employee manual. The preface to the 1999-2000 GUHSD Support Staff Guide, reads: "The Glendale Union High School District is governed by citizens from your school community – a local government."

subdivision of the state. A school district is a political subdivision."); *R.L. Augustine Const. Co. v. Peoria Unified Sch. Dist. No. 11*, 188 Ariz. 368, 371, 936 P.2d 554, 557 (1994) ("[T]he school district is not an administrative agency. . . . "). The lone exception is *School Dist. No. 48 v. Rivera*, 30 Ariz. 1, 243 P. 609 (1926). This case contains contradictory statements about the corporate status of school districts. *Id.* at 4-5, 610 (labeling "school corporations" as both political subdivisions and state agencies in the course of the opinion). Moreover, the rule in *Rivera* was overturned nearly forty years ago. *See Stone v. Arizona Highway Commission*, 93 Ariz. 384, 381 P.2d 107 (1963).

GUHSD also has no foundation for the contention that it would be anomalous to treat school districts differently than state universities or the Board of Regents for purposes of the Eleventh Amendment. These are discrete institutions with a distinct history, structure, purpose, and scope. There is nothing anomalous about treating differing political entities differently. Nor is it contrary to the Enabling Act as GUHSD suggests. The Enabling Act requires Arizona to establish and maintain "a system of public schools which shall be open to all the children of said State and free from sectarian control;. . . . " Enabling Act § 20. Nothing in this Act requires the state of Arizona to establish an identical organization and administration for the state's high schools and universities.

f. Conclusion

GUHSD has failed to prove that it is entitled to Eleventh Amendment immunity. The state treasury will not be responsible for paying any money judgment that

may be levied against GUHSD. The hiring and firing of school personnel and other functions performed by GUHSD are not central governmental functions of the State. GUHSD can sue and be sued. It is a political subdivision, separate from the state. While it is uncertain whether GUHSD may continue to hold and control property in its own name, the balance of all the other factors tips sharply against a finding that GUHSD is an arm of the state and entitled to immunity. GUHSD's motion to dismiss all claims based on Eleventh Amendment immunity is, therefore, denied. Because the Court has determined that GUHSD cannot claim Eleventh Amendment immunity as an arm of the state, the Court does not need to consider the parties' arguments relating to the abrogation or waiver of immunity under the RA.

2. Supplemental Jurisdiction

GUHSD asks the Court to decline to exercise supplemental jurisdiction over Savage's ACRA claim. The Court has supplemental jurisdiction over state law claims so related to the plaintiff's federal law claims "that they form part of the same case or controversy" under the United States Constitution. 28 U.S.C. § 1367(a). The district court has discretion to decline jurisdiction over state law claims under certain circumstances. *Id.* § 1367(c). One permissible circumstance is that "the district court has dismissed all claims over which it has original jurisdiction. *Id.* § 1367(c)(3).

The facts and circumstances relating to GUHSD's alleged violation of the ADA and RA are identical to the facts relied upon for Savage's state law claim. Therefore, they are part of the same case or controversy. GUHSD

would have the Court dismiss Savage's ACRA claim because it believes Savage's federal law claims are barred by the Eleventh Amendment, leaving only a state law claim before the Court. As stated above, GUHSD is not entitled Eleventh Amendment immunity, and the Court has been given no other reason to dismiss the federal law claims or to decline supplemental jurisdiction over Savage's ACRA claim.

3. Punitive Damages

a. Section 504 Remedies

Section 504 of the RA prevents disability discrimination by any program or entity receiving federal funds. 29 U.S.C. § 794(a). The remedies available under this statute have long been in debate because, when originally enacted, § 504 did not explicitly create a private right of action. One has since been implied by the courts; yet, because no private right of action was written into the statute, no explicit remedies provision existed either. In 1978, a remedies provision was added to the statute. 29 U.S.C. § 794a(a)(2). That amendment dictated that § 504 remedies should be consistent with the remedies available under Title VI of the Civil Rights Act of 1964. *Id.* However, this did not serve to eliminate the confusion over available remedies, because the cause of action under Title VI was also implied by the courts, and no specific remedies provision was included in the Act. 42 U.S.C. § 2000d. Therefore, the debate over permissible remedies for § 504 violations raged on. Some courts allowed compensatory damages, while others did not. Some courts chose to allow compensatory damages for intentional discrimination but not for unintentional discrimination. *See Moreno v. Consolidated Rail Corp.*, 99 F.3d 782, 789-90 (9th Cir. 1996) (discussing

the history of RA remedies and listing cases). Yet, there was one issue on which the courts almost universally agreed; punitive damages were not available under § 504 of the RA. *Id.* at 790.

In 1992, after the Supreme Court decision in *Franklin v. Gwinnet County Public Schools*, 503 U.S. 60 (1992), RA remedies jurisprudence took a sharp turn. Although *Franklin* was a Title IX case, it has been readily applied to the RA because the issues are identical. The courts have implied a private right of action under Title IX and this Act also contains no remedies provision. 20 U.S.C. §§1681-1688. Thus, the same debate of what remedies are permissible and appropriate has continued around this area of the law.

The specific issue in *Franklin* was whether compensatory damages are available for an intentional violation of Title IX. To answer this question the Supreme Court established a general rule for determining available remedies under a federal statute. "The general rule, therefore, is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Franklin*, 503 U.S. at 70-71. The court then concluded that Congress had not manifested an intent to limit the remedies available under Title IX. *Id.* at 72. The Court also decided that monetary damages were appropriate because legal remedies must be considered before equitable remedies. *Id.* at 75-76 ("[A] court should determine the adequacy of a remedy in law before resorting to equitable relief.").

As a result of *Franklin* the RA landscape began to change. Liberally interpreting Franklin's general rule,

courts began to allow punitive damages under § 504. *Gorman v. Easley*, 257 F.3d 738 (8th Cir. 2001); *Pandazides v. Virginia Bd. of Educ.*, 13 F.3d 823 (4th Cir. 1994). Other courts suggested that *Franklin* should have a much more limited application. *Doe v. County of Centre*, 242 F.3d 437, 456 (3d Cir. 2001) ("In the present case, the principle of *Franklin* has limited applicability. . . . "); *Ferguson v. City of Phoenix*, 157 F.3d 668 (9th Cir. 1998), ("The holding in *Franklin* merely states that compensatory damages are available for intentional violations of Title IX.");[8] *Moreno*, 99 F.3d at 789 n.3 ("[I]t is by no means

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[8] *Ferguson* did not discuss punitive damages; it addressed the availability of compensatory damages for unintentional violations of § 504. 157 F.3d 668 (9th Cir. 1998). This court briefly confronted the issue of punitive damages in *Ferguson*. 931 F. Supp. 688, 697 (D. Ariz. 1996). While the district court suggested that punitive damages might be available post-*Franklin*, the court did not actually decide the issue. The court determined that there was no evidence of intentional conduct so punitive damages were not available regardless. Moreover, the court's suggestion was based on the panel decision in *Moreno*, that was vacated shortly thereafter. *See Moreno v. Consolidated Rail Corp.*, 63 F.3d 1404 (6th Cir.), *vacated*, 70 F.3d 433 (1995), *reh'g en banc*, 99 F.3d 782 1996) (holding that punitive damages are not available under § 504 of the RA).

The Ninth Circuit has not decided whether punitive damages are available under § 504 of the RA after *Franklin*. The court was presented with the question, but declined to decide the issue because the case was not an appeal from a final order. *Burns-Vidlak v. Chandler*, 165 F.3d 1257 (9th Cir. 1999).

The case of *Burns-Vidlak v. Chandler*, 980 F. Supp. 1144 (D. Haw. 1997), took a very expansive approach to *Franklin*, and held that punitive damages were available under § 504 of the RA because there was no express statute to the contrary. That court specifically rejected the reasoning of the Sixth Circuit sitting en banc in *Moreno*. However, *Burns-Vidlak* was decided before the Supreme Court case of *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998), and the Ninth Circuit

(Continued on following page)

clear that Franklin has more than peripheral relevance to the case at bar.").

If the holding in *Franklin* is so narrow that it does not extend to the issue of punitive damages under § 504 of the RA then there is no reason to go any further. Absent *Franklin*, this Court has no justification for upsetting the previous understanding that punitive damages are not available under § 504. Even examining the issue at hand in light of *Franklin*, the Court concludes that punitive damages are not available against GUHSD under § 504 of the RA.

b. *Franklin* Analysis

The Court starts with the general rule and assumes that all remedies are available, including punitive damages, for violations of § 504. *Franklin*, 503 U.S. at 70-71. The Court must then determine whether punitive damages fall outside the general rule. A remedy is taken outside of the rule in one of two ways: 1) Congress manifests an intent to limit the remedies available under a particular statute, or 2) the remedy being sought is not appropriate. *Id.*

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decision in *Ferguson*, 157 F.3d at 668, which both suggest a narrower view of *Franklin*'s holding, more in line with the reasoning of *Moreno*.

There are two cases which follow *Burns-Vidlak*. *Davison v. Barbara High Sch. Dist.*, 48 F. Supp. 2d 1225, 1233 (C.D. Cal. 1998), assumed with minimal discussion, beyond lamenting the scarcity of case law on the issue, that punitive damages were available under Title VI. This case was also decided before *Gebser* and *Ferguson*. Recently, *Patricia N. v. Lemahieu*, 141 F. Supp. 2d 1243 (D. Haw. 2001), followed Burns-Vidlak but did so without examining the possible impact of *Gebser* or *Ferguson* on this issue.

i. Congressional Intent

Congressional intent with regard to remedies for an implied right of action is not easy to divine. The Court in *Franklin* suggested that the text and history of a statute are examined only to determine whether Congress intended a right of action, but not the intended remedies for that right. *Id.* at 66. Thus, nothing short of an explicit statement by Congress will demonstrate an intent to limit remedies according to *Franklin*. *Id.* Justice Scalia, in his concurring opinion in *Franklin*, criticized this approach. He pointed out that such a rule requires Congress to determine remedies for a cause of action it does not know it is creating. *Id.* at 77 (Scalia, J., concurring in the judgment). This leads to the troublesome result that "the most questionable of private rights will also be the most expansively remediable." *Id.* at 78.

In *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 284-85 (1998), the Court acknowledged the criticism noted above and softened the intent analysis. The Court observed that a statute's structure and purpose should be considered when determining the scope of available remedies, just as it is when fashioning a right of action. *Id.* at 284. Therefore, instead of seeking an express statement, the Court attempted to infer the remedial scheme Congress would have fashioned had it included an express action in the statute. *Id.* at 285.

Looking at the structure of the RA and Congressional activity after a cause of action was implied establishes that Congress would not have included a punitive damages remedy under § 504. First, the statute itself is in the nature of a contract. A program receives federal aid in exchange for providing disability access. Punitive damages

are not an acceptable remedy for breach of contract. Therefore, the structure of the statute itself demonstrates Congress's intent to exclude punitive damages from the statute's remedial scope.

Second, Congress has amended the RA to address remedies. *See* 29 U.S.C. § 794a; 42 U.S.C. § 2000d-7(a); 42 U.S.C. §§ 12101-12213. Knowing that courts were not allowing punitive damages under § 504, Congress did not attempt to change that understanding in those amendments. On the other hand, Congress did insert punitive damages provisions into other statutes, including § 501 of the RA, with caps on the level of recovery. These actions taken together imply that Congress never intended a punitive damages remedy under § 504 because they specifically ensured that such a remedy was available for other causes of action (on a limited basis), while maintaining the status quo under § 504.

ii. Appropriateness

Even if there was no Congressional intent to limit the availability of punitive damages, there are strong indications that such a remedy would be inappropriate under § 504. There are two analytical approaches for determining whether a particular remedy is appropriate. 1) The Court can determine whether the remedy is generally appropriate to the statute itself. *Moreno*, 99 F.3d at 791. 2) The Court can also determine whether a remedy is appropriate based on the specific facts of each case. *Gorman*, 257 F.3d at 749. The general statutory method approach is the one espoused by the Supreme Court. The Court stated that "[t]he 'general rule' . . . yields . . . to avoid frustrating the purposes of the statute involved." *Gebser*, 524 U.S. at

284. Similarly, the Ninth Circuit took a general approach in *Ferguson v. City of Phoenix*, when it held that compensatory damages are not appropriate for unintentional violations of Title IX. 157 F.3d at 674.

Looking at appropriateness to the statute in general, implying an unlimited punitive damages remedy under § 504 is inappropriate for two reasons. First, other sections of the RA have specific punitive damage limits. The addition of an unlimited punitive damages remedy under § 504 would frustrate and contradict other provisions of the statute. "It would be highly anomalous to let a plaintiff asserting an implied right of action under § 504 recover more in punitive damages than could be recovered by a plaintiff asserting the statutory remedy created for § 501." *Moreno*, 99 F.3d at 791. Second, § 504 already includes methods of punishment other than punitive damages. Courts should be wary of reading remedies into a statute that already expressly provides a remedy. *Id.* at 791-92.

More particularly addressing the appropriateness to this case, punitive damages are improper because the defendant is a school district. The common law did not allow punitive damages against local governments because courts were reluctant to punish individual taxpayers and bankrupt local governments for the opprobrious actions of a few public officials. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266 (1981). The Supreme Court declared:

> Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should

> be visited upon the shoulders of blameless or unknowing taxpayers.

Id. Therefore, punitive damages are not available against municipalities under § 1983 unless specifically enacted by statute. *Id.* at 271.

The same concerns over punitive damages against a local government that existed at common law and continue under § 1983 are evident in an action against GUHSD under § 504. *See Doe*, 242 F.3d at 455-58 (3d Cir. 2001) (holding that *City of Newport* applies with equal force to § 504 of the RA). GUHSD is a local government and punitive damages would result in higher taxes or reduced services. This fact is the most disturbing; the children may be the ones most punished by a punitive damages award in this case. Therefore, punitive damages are not an appropriate remedy against GUHSD.

c. Conclusion

Punitive damages under § 504 of the RA were neither intend by Congress nor are they appropriate to the statutory scheme or the circumstances of this case. Therefore, Savage's request for punitive damage will not be entertained by the Court and should be stricken from the Complaint.

IT IS ORDERED that Plaintiff's Motion to Strike New Argument in Defendant's Supplemental Reply in Support of Defendant's Motion to Dismiss (doc. #68) is DENIED.

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss is GRANTED in part and DENIED in part.

IT IS FURTHER ORDERED striking Plaintiff's request for punitive damages in Count I, paragraph F and Count II, paragraph F of the First Amended Complaint.

DATED this 20, day of March, 2002.

/s/ Robert C. Broomfield
Robert C. Broomfield
Senior United States
District Judge

Copies to counsel of record

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHELLEY SAVAGE, Plaintiff-Appellee, v. GLENDALE UNION HIGH SCHOOL, DISTRICT NO. 205, Maricopa County, Defendant-Appellant.	No. 02-15743 D.C. No. CV-00-01546-RCB ORDER (Filed Oct. 22, 2003)

Before: BEEZER, THOMAS, and CLIFTON, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Arizona Constitution Article XI

Section 1. A. The legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system, which system shall include:

1. Kindergarten schools.
2. Common schools.
3. High schools.
4. Normal schools.
5. Industrial schools.
6. Universities, which shall include an agricultural college, a school of mines, and such other technical schools as may be essential, until such time as it may be deemed advisable to establish separate state institutions of such character.

B. The legislature shall also enact such laws as shall provide for the education and care of pupils who are hearing and vision impaired.

Section 2. The general conduct and supervision of the public school system shall be vested in a State Board of Education, a State Superintendent of Public Instruction, county school superintendents, and such governing boards for the State institutions as may be provided by law.

Section 3. The State Board of Education shall be composed of the following members: the Superintendent of Public Instruction, the President of a State University or a State College, three lay members, a member of the State Junior College Board, a superintendent of a high school

district, a classroom teacher and a county school superintendent. Each member, other than the Superintendent of Public Instruction, to be appointed by the Governor with the consent of the Senate in the manner prescribed by law. The powers, duties, compensation and expenses, and the terms of office of the Board shall be such as may be prescribed by law.

Section 4. The State Superintendent of Public Instruction shall be a member, and secretary, of the State Board of Education, and, ex-officio, a member of any other board having control of public instruction in any State institution. His powers and duties shall be prescribed by law.

Section 5. The regents of the University, and the governing boards of other State educational institutions, shall be appointed by the Governor with the consent of the Senate in the manner prescribed by law, except that the Governor shall be, ex-officio, a member of the board of regents of the University.

Section 6. The University and all other State educational institutions shall be open to students of both sexes, and the instruction furnished shall be as nearly free as possible.

The Legislature shall provide for a system of common schools by which a free school shall be established and maintained in every school district for at least six months in each year, which school shall be open to all pupils between the ages of six and twenty-one years.

Section 7. No sectarian instruction shall be imparted in any school or State educational institution that may be established under this Constitution, and no religious or political test or qualification shall ever be required as a

condition of admission into any public educational institution of the State, as teacher, student, or pupil; but the liberty of conscience hereby secured shall not be so construed as to justify practices or conduct inconsistent with the good order, peace, morality, or safety of the State, or with the rights of others.

Section 8. A. A permanent state school fund for the use of the common schools shall be derived from the sale of public school lands or other public lands specified in the enabling act approved June 20, 1910; from all estates or distributive shares of estates that may escheat to the state; from all unclaimed shares and dividends of any corporation incorporated under the laws of Arizona; and from all gifts, devises, or bequests made to the state for general educational purposes.

B. The rental derived from school lands, with such other funds as may be provided by law shall be apportioned only for common and high school education in Arizona, and in such manner as may be prescribed by law.

Section 9. The amount of this apportionment shall become a part of the county school funds, and the Legislature shall enact such laws as will provide for increasing the county fund sufficiently to maintain all the public schools of the county for a minimum term of six months in every school year. The laws of the State shall enable cities and towns to maintain free high schools, industrial schools, and commercial schools.

Section 10. The revenue for the maintenance of the respective State educational institutions shall be derived from the investment of the proceeds of the sale, and from the rental of such lands as have been set aside by the Enabling Act approved June 20, 1910, or other legislative

enactment of the United States, for the use and benefit of the respective State educational institutions. In addition to such income the Legislature shall make such appropriations, to be met by taxation, as shall insure the proper maintenance of all State educational institutions, and shall make such special appropriations as shall provide for their development and improvement.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

SHELLEY SAVAGE, Plaintiff, v. GLENDALE UNION HIGH SCHOOL DISTRICT NO. 205 OF MARICOPA COUNTY. Defendant.	No. CIV '00 1546 PHX RCB **COMPLAINT** **Jury Trial Requested** (Filed Aug. 11, 2000)

Plaintiff, by and through counsel, states and alleges the following:

INTRODUCTION

1. This action arises under Title I of the Americans With Disabilities Act, 42 U.S.C. §§ 12101, *et seq.* (ADA), Title I of the Civil Rights Act of 1991, 42 U.S.C. § 1981a, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and the Arizona Civil Rights Act, A.R.S. § 41-1461 *et seq.*, to provide appropriate relief to Shelley Savage for unlawful discriminatory practices. Shelley Savage was employed by the Defendant, Glendale Union High School District

(GUHSD). GUHSD required Plaintiff to put a flag and flagpole on her wheelchair as a term of her employment. When Plaintiff refused and objected to the condition of employment, Defendant terminated her employment.

JURISDICTION AND VENUE

2. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1337, and 1343. This action is authorized under Section 107(a) of the Americans With Disabilities Act (ADA), 42 U.S.C. § 12117(a), which incorporates by reference Sections 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)-5(f)(1) and (3), and pursuant to Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a. The action also is authorized by 29 U.S.C. § 794(a), which incorporates Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* This Court has supplemental jurisdiction over the Arizona Civil Rights Act claim pursuant to 28 U.S.C. § 1367.

3. The employment practices alleged to be unlawful were committed within the jurisdiction of the United States District Court for the District of Arizona.

PARTIES

4. Plaintiff Shelley Savage lives in Maricopa County, Arizona.

5. Shelley Savage has a physical disability. She uses a wheelchair for mobility and, because of her underlying physical impairment, is substantially limited in at least one major life activity.

6. Shelley Savage was an employee of Defendant.

7. At all relevant times, Defendant has continuously been a school district doing business in Maricopa County, Arizona, and has continuously employed 15 or more employees.

8. At all relevant times, Defendant has continuously been an employer engaged in an industry affecting commerce under Section 101(5) of the ADA, 42 U.S.C. § 12111(5), and Section 101(7) of the ADA, 42 U.S.C. § 12111(7), which incorporates by reference Sections 701(g) and (h) of Title VII, 42 U.S.C. §§ 2000e(g) and (h).

9. At all times relevant, Defendant has been a recipient of federal financial assistance pursuant to Section 504 of the Rehabilitation Act.

10. At all relevant times, Defendant has been an employer covered by Title I of the ADA and Section 504 of the Rehabilitation Act.

11. At all times relevant, Defendant has been an employer as defined by the Arizona Civil Rights Act, A.R.S. § 14-1461(2).

STATEMENT OF CLAIMS

12. Plaintiff Shelley Savage began working for Glendale Union High School District at Independence High School on July 7, 1999, as an educational services technician.

13. On or about August 16, 1999, management staff at Independence High School required Ms. Savage to put a flag and flagpole on her wheelchair.

14. Ms. Savage objected to the request. She informed management staff that this request was discriminatory.

15. Defendant continued to require that Ms. Savage put the flag and flagpole on her wheelchair.

16. When Ms. Savage refused to put a flag and flagpole on her wheelchair, Defendant terminated her employment.

17. Shelley Savage filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC Charge No. 350-99-2259) on September 9, 1999.

18. Through a work sharing agreement, the charge filed with the EEOC was filed with the Arizona Civil Rights Section of the Attorney General's office under the Arizona Civil Rights Act.

19. On June 2, 2000, the EEOC issued a determination letter finding reasonable cause to believe Defendant discriminated against Ms. Savage by subjecting her to discriminatory terms and conditions of employment and discharged her in retaliation for her opposition to the discriminatory terms of employment.

20. On August 10, 2000, the EEOC issued a right to sue letter.

21. On July 31, 2000, the Arizona Civil Rights Section issued a right to sue letter.

22. Plaintiff submitted a Notice of Claim to Defendant.

23. All conditions precedent to filing a lawsuit under the ADA have been met.

24. All conditions precedent to filing a lawsuit under the Arizona Civil Rights Act have been met.

25. A qualified individual with a disability is a person with a disability who, with or without reasonable accommodation, can perform the essential functions of the position she holds. 42 U.S.C. § 12111(8).

26. A person with a disability under the ADA is a person with a physical or mental impairment that substantially limits at least one major life activity, has a record of a substantially limiting impairment, or is regarded as having a substantially limiting impairment. 42 U.S.C. §§ 12102(2)(A)-(C).

27. Under Title I of the ADA, covered employers shall not discriminate against a qualified individual with a disability because of the disability in regard to the terms and conditions of employment. 42 U.S.C. § 12112(a).

28. The ADA makes it unlawful discrimination for an employer to retaliate against an employee who has opposed a discriminatory practice. 42 U.S.C. § 12203(a).

29. Section 504 of the Rehabilitation Act makes it unlawful for a recipient of federal assistance to discriminate against a person with a disability or retaliate against a person with a disability who has opposed discriminatory practices. 29 U.S.C. § 794.

30. The Arizona Civil Rights Act also provides that an employer may not discriminate against a qualified individual with a disability, A.R.S. § 41-1463(B), and may not retaliate against an employee who has opposed a discriminatory practice, A.R.S. 41-1464(A).

31. Shelley Savage is a qualified individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the position of educational services technician with the Defendant.

32. Shelley Savage opposed Defendant's discriminatory practices.

33. Defendant's request that Ms. Savage put a flag and flagpole on her wheelchair constituted discriminatory terms and conditions of Plaintiff's employment.

34. Defendant's termination of Ms. Savage because she refused to put a flag and flagpole on her wheelchair was discriminatory and in retaliation for Plaintiff's opposition to the discriminatory terms and conditions of employment.

COUNT I

35. Plaintiff restates and reincorporates by reference each of the allegations contained in paragraphs 1 through 34 above.

36. The employment practices complained of in paragraphs 4 through 6, 12 through 16 and 31 through 34 violated the ADA.

37. The employment practices complained of in paragraphs 4 through 6, 12 through 16 and 31 through 34 were intentional.

38. The unlawful employment practices complained of in paragraphs 4 through 6, 12 through 16 and 31 through 34 were done with malice or with reckless indifference to the federally protected rights of Shelley Savage.

39. As a result of Defendant's discriminatory actions, Plaintiff Shelley Savage has suffered damages including, but not limited to, lost wages and pecuniary and nonpecuniary losses.

Wherefore, Plaintiff respectfully requests that this Court:

A. Grant a permanent injunction enjoining Defendant, its officers, successors, assigns, and all persons in active concert or participation with it, from engaging in discrimination in the terms and conditions of employment of its employees on the basis of disability, and any other employment practice which discriminates on the basis of disability, including retaliation.

B. Order Defendant to institute and carry out policies, practices, and programs which provide equal employment opportunities for qualified individuals with disabilities, and which eradicate the effects of its past and present unlawful employment practices.

C. Order Defendant to make whole Plaintiff by providing her back pay with prejudgment interest, in amounts to be determined at trial, and by other appropriate affirmative relief necessary to eradicate the effects of its unlawful employment practices, including but not limited to reinstatement to the position of educational services technician.

D. Order Defendant to make whole Plaintiff by providing compensation for past and future pecuniary losses resulting from the unlawful employment practices in amounts to be determined at trial.

E. Order Defendant to make whole Plaintiff by providing compensation for past and future nonpecuniary losses resulting from the unlawful practices complained of, including humiliation, in amounts to be determined at trial.

F. Order Defendant to pay Plaintiff punitive damages for its malicious and reckless conduct in amounts to be determined at trial.

G. Grant such further relief as the Court deems necessary and proper in the public interest.

H. Award Plaintiff her costs and attorney's fees in this action.

COUNT II

40. Plaintiff restates and reincorporates by reference each of the allegations contained in paragraphs 1 through 34 above.

41. The employment practices complained of in paragraphs 4 through 6, 12 through 16 and 31 through 34 violated Section 504 of the Rehabilitation Act, 29 U.S.C. § .794.

42. The employment practices complained of in paragraphs 4 through 6, 12 through 16 and 31 through 34 were intentional.

43. The unlawful employment practices complained of in paragraphs 4 through 6, 12 through 16 and 31 through 34 were done with malice or with reckless indifference to the federally protected rights of Shelley Savage.

44. As a result of Defendant's discriminatory actions, Plaintiff Shelley Savage has suffered damages including, but not limited to, lost wages and pecuniary and nonpecuniary losses.

Wherefore, Plaintiff respectfully requests that this Court:

A. Grant a permanent injunction enjoining Defendant, its officers, successors, assigns, and all persons in active concert or participation with it, from engaging in discrimination in the terms and conditions of employment of its employees on the basis of disability, and any other employment practice which discriminates on the basis of disability, including retaliation.

B. Order Defendant to institute and carry out policies, and programs which provide equal employment opportunities for qualified individuals with disabilities, and which eradicate the effects of its past and present unlawful employment practices.

C. Order Defendant to make whole Plaintiff by providing her back pay with prejudgment interest, in amounts to be determined at trial, and by other appropriate affirmative relief necessary to eradicate the effects of its unlawful employment practices, including but not limited to reinstatement to the position of educational services technician.

D. Order Defendant to make whole Plaintiff by providing compensation for past and future pecuniary losses resulting from the unlawful employment practices in amounts to be determined at trial.

E. Order Defendant to make whole Plaintiff by providing compensation for past and future nonpecuniary losses resulting from the unlawful practices, including humiliation, in amounts to be determined at trial.

F. Order Defendant to pay Plaintiff punitive damages for its malicious and reckless conduct in amounts to be determined at trial.

G. Grant such further relief as the Court deems necessary and proper in the public interest.

H. Award Plaintiff her costs and attorney's fees in this action.

COUNT III

45. Plaintiff restates and reincorporates by reference each of the allegations contained in paragraphs 1 through 34.

46. The employment practices complained of in paragraphs 4 through 6, 12 through 16 and 31 through 34 violated the Arizona Civil Rights Act, A.R.S. § 41-1461 *et seq*.

47. The employment practices complained of in paragraphs 4 through 6, 12 through 16 and 31 through 34 were intentional.

48. As a result of Defendant's discriminatory actions, Plaintiff Shelley Savage has suffered damages including, but not limited to, lost wages and pecuniary and nonpecuniary losses.

Wherefore, Plaintiff respectfully requests that this Court:

A. Grant a permanent injunction enjoining Defendant, its officers, successors, assigns, and all persons in active concert or participation with it, from engaging in discrimination in the terms and conditions of employment of its employees on the basis of disability, and any other employment practice which discriminates on the basis of disability, including retaliation.

B. Order Defendant to institute and carry out policies, practices, and programs which provide equal employment opportunities for qualified individuals with disabilities, and which eradicate the effects of its past and present unlawful employment practices.

C. Order Defendant to make whole Plaintiff by providing her back pay with prejudgment interest, in amounts to be determined at trial, and by other appropriate affirmative relief necessary to eradicate the effects of its unlawful employment practices, including but not limited to reinstatement to the position of educational services technician.

D. Order Defendant to make whole Plaintiff by providing compensation for past and future pecuniary losses resulting from the unlawful employment practices in amounts to be determined at trial.

E. Order Defendant to make whole Plaintiff by providing compensation for past and future nonpecuniary losses resulting from the unlawful practices, including humiliation, in amounts to be determined at trial.

F. Grant such further relief as the Court deems necessary and proper in the public interest.

G. Award Plaintiff her costs and attorney's fees in this action.

JURY TRIAL DEMAND

Plaintiff requests a jury trial on all questions of fact raised by her complaint.

- RESPECTFULLY SUBMITTED THIS 11th DAY OF August, 2000.

/s/ Ellen Sue Katz
Ellen Sue Katz
Rosey Daly-Rooney
Arizona Center for Disability Law
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Arizona State Bar # 012214

Attorneys for Plaintiff

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Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

SHELLEY SAVAGE, an individual, Plaintiff, v. GLENDALE UNION HIGH SCHOOL DISTRICT NO. 205 OF MARICOPA COUNTY, JAMES L. KIEFFER, Glendale Union High School District Superintendent and Member of the Glendale Union High School District Governing Board;) RICHARD STAPLEY, Member of the Glendale Union High School District Governing Board; VICKI JOHNSON, Member of the Glendale Union High School District Governing Board;) KEVIN CLAYBORN, Member of the Glendale Union High School District Governing Board; IAN	) No. CV2001-013740)) **COMPLAINT**)) [Civil Rights – Employment Discrimination])) Assigned to:

HUGH, Member of the Glendale)
Union High School Board;)
)
Defendants.)

Plaintiff, by and through counsel, states and alleges the following for her Complaint against the Defendants:

GENERAL ALLEGATIONS

1. At all relevant times, Plaintiff Shelley Savage was a resident of Maricopa County, Arizona.

2. Shelley Savage has a physical disability. She uses a wheelchair for mobility and, because of her underlying physical impairment, is substantially limited in at least one major life activity.

3. Shelley Savage was an employee of the Defendant Glendale Union High School District ("GUHSD").

4. At all relevant times, Defendant GUHSD has continuously been a school district doing business in Maricopa County, Arizona, and has continuously employed 15 or more employees.

5. All of the employment practices alleged to be unlawful in this Complaint were committed in Maricopa County, Arizona.

6. At all relevant times, Defendant GUHSD has continuously been an employer engaged in an industry affecting commerce under Section 101(5) of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12111(5), and Section 101(7) of the ADA, 42 U.S.C. § 12111(7), which incorporates by reference Sections 701(g) and (h) of Title VII, 42 U.S.C. §§ 2000e(g) and (h).

7. At all relevant times, Defendant GUHSD has been a recipient of federal financial assistance pursuant to Section 504 of the Rehabilitation Act of 1973.

8. At all relevant times, Defendant GUHSD has been an employer covered by Title I of the ADA and Section 504 of the Rehabilitation Act of 1973.

9. At all relevant times, Defendant GUHSD has been an employer as defined by the Arizona Civil Rights Act, A.R.S. § 14-1461(2).

10. At all relevant times, Defendant JAMES L. KIEFFER was the Superintendent of the Defendant GUHSD and a Member of the GUHSD Governing Board. In these positions, Defendant JAMES L. KIEFFER has responsibility for the development and implementation of GUHSD's policies, practices and programs, and has the authority to act on behalf of Defendant GUHSD.

11. At all relevant times, Defendant RICHARD STAPLEY was a Member of the Defendant GUHSD's Governing Board. In this position, Defendant RICHARD STAPLEY has responsibility for the development and implementation of GUHSD's policies, practices and programs, and has the authority to act on behalf of Defendant GUHSD.

12. At all relevant times, Defendant VICKI JOHNSON was a Member of the Defendant GUHSD's Governing Board. In this position, Defendant VICKI JOHNSON has responsibility for the development and implementation of GUHSD's policies, practices and programs, and has the authority to act on behalf of Defendant GUHSD.

13. At all relevant times, Defendant KEVIN CLAYBORN was a Member of the Defendant GUHSD's Governing

Board. In this position, Defendant KEVIN CLAYBORN has responsibility for the development and implementation of GUHSD's policies, practices and programs, and has the authority to act on behalf of Defendant GUHSD.

14. At all relevant times, Defendant IAN HUGH was a Member of the Defendant GUHSD's Governing Board. In this position, Defendant IAN HUGH has responsibility for the development and implementation of GUHSD's policies, practices and programs, and has the authority to act on behalf of Defendant GUHSD.

15. Plaintiff sues each of the individual Defendants in their official capacities. All of the acts and/or omissions alleged herein were done jointly and severally.

16. Plaintiff Shelley Savage began working for Defendant GUHSD at Independence High School on or about July 7, 1999, as an educational services technician.

17. On or about August 16, 1999, management staff at Independence High School required Ms. Savage to put a flag and flagpole on her wheelchair.

18. Ms. Savage objected to the request. She informed management staff that this request was discriminatory.

19. Defendant GUHSD continued to require that Ms. Savage put the flag and flagpole on her wheelchair.

20. When Ms. Savage refused to put a flag and flagpole on her wheelchair, Defendant GUHSD terminated her employment.

21. On or about August 25, 1999, Ms. Savage wrote a letter to Wendy Blair, Principal of Independence High School, confirming her understanding that her employment

had been terminated for insubordination because she would not put a flag and flagpole on her wheelchair. On information and belief, this letter did not result in communication by the Defendant school district to Ms. Savage about continuing her employment without this condition.

22. On or about August 30, 1999, Ms. Savage wrote a letter to Defendant JAMES L. KIEFFER in which she explained that she had been asked to obtain a flag and flagpole for her wheelchair, that she felt that the request singled her out because of her disability and was discriminatory, and that she was terminated when she refused to comply with this request. On information and belief, this letter did not lead to an investigation of this matter or to a change in Defendant GUHSD's position about the necessity of having Ms. Savage place a flag and flagpole on her wheelchair as a condition of employment.

23. As a result of the Defendants' conduct, Shelley Savage suffered and continues to suffer emotional distress, humiliation, anxiety, stress, embarrassment, feelings of stigmatization and degradation, anguish and loss of esteem.

24. Shelley Savage filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC Charge No. 350-99-2259) on September 9, 1999.

25. Through a work sharing agreement, the charge filed with the EEOC was filed with the Arizona Civil Rights Section of the Attorney General's office under the Arizona Civil Rights Act.

26. On June 2, 2000, the EEOC issued a determination letter finding reasonable cause to believe Defendant

GUHSD discriminated against Plaintiff by subjecting her to discriminatory terms and conditions of employment and discharged her in retaliation for her opposition to the discriminatory terms of employment.

27. On August 10, 2000, the EEOC issued a right to sue letter.

28. On July 31, 2000, the Arizona Civil Rights Section issued a right to sue letter.

29. Plaintiff submitted a Notice of Claim to Defendant GUHSD.

30. All conditions precedent to filing a lawsuit under the ADA have been met.

31. All conditions precedent to filing a lawsuit under the Arizona Civil Rights Act have been met.

32. On August 11, 2000, Plaintiff filed a lawsuit in the United States District Court, District of Arizona, alleging violations of the Arizona Civil Rights Act, the Americans with Disabilities Act, and Section 504 the Rehabilitation Act of 1973.

33. A qualified individual with a disability is a person with a disability who, with or without reasonable accommodation, can perform the essential functions of the position she holds. 42 U.S.C. § 12111(8).

34. A person with a disability under the Americans with Disabilities Act ("ADA") is a person with a physical or mental impairment that substantially limits at least one major life activity, has a record of a substantially limiting impairment, or is regarded as having a substantially limiting impairment. 42 U.S.C. §§ 12102(2)(A)-(C).

35. Under Title I of the ADA, covered employers shall not discriminate against a qualified individual with a disability because of the disability in regard to the terms and conditions of employment. 42 U.S.C. § 12112(a).

36. The ADA makes it unlawful discrimination for an employer to retaliate against an employee who has opposed a discriminatory practice. 42 U.S.C. § 12203(a).

37. Section 504 of the Rehabilitation Act of 1973 makes it unlawful for a recipient of federal assistance to discriminate against a person with a disability or retaliate against a person with a disability who has opposed discriminatory practices. 29 U.S.C. § 794.

38. The Arizona Civil Rights Act also provides that an employer may not discriminate against a qualified individual with a disability, A.R.S. § 41-1463(B), and may not retaliate against an employee who has opposed a discriminatory practice, A.R.S. 41-1464(A).

39. Shelley Savage is a qualified individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the position of educational services technician with the Defendant GUHSD.

40. Defendant GUHSD's request that Ms. Savage put a flag and flagpole on her wheelchair constituted discriminatory terms and conditions of Plaintiff's employment.

41. Shelley Savage opposed Defendant's discriminatory practices.

42. Defendant GUHSD's termination of Ms. Savage because she refused to put a flag and flagpole on her

wheelchair was discriminatory and in retaliation for Plaintiff's opposition to the discriminatory terms and conditions of employment.

COUNT I – REHABILITATION ACT OF 1973

43. Plaintiff restates and incorporates by reference each of the allegations contained in paragraphs 1 through 42 above.

44. The employment practices complained of in paragraphs 16 through 22 and 39 through 42 violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, *et. seq.*

45. The employment practices complained of in paragraphs 16 trough 23 and 39 through 42 were intentional.

46. The unlawful employment practices complained of in paragraphs 16 through 23 and 39 through 42 were done with malice or with reckless indifference to the federally protected rights of Shelley Savage.

47. As a result of Defendants' discriminatory actions, Plaintiff Shelley Savage has suffered damages including, but not limited to, lost wages and pecuniary and nonpecuniary losses. The non-pecuniary losses Ms. Savage has suffered and continues to suffer include emotional distress, humiliation, anxiety, stress, embarrassment, feelings of stigmatization and degradation, anguish and loss of esteem.

Wherefore, Plaintiff respectfully requests that this Court:

A. Grant a permanent injunction enjoining Defendant GUHSD, its officers, successors, assigns, and all persons in active concert or participation with it, from engaging in discrimination in the terms and conditions of employment of its employees on the basis of disability, and any other employment practice which discriminates on the basis of disability, including retaliation.

B. Order Defendants to institute and carry out policies, practices, and programs which provide equal employment opportunities for qualified individuals with disabilities, and which eradicate the effects of its past and present unlawful employment practices.

C. Order Defendants to make whole Plaintiff by providing her back pay with prejudgment interest, in amounts to be determined at trial, and by other appropriate affirmative relief necessary to eradicate the effects of its unlawful employment practices, including but not limited to reinstatement to the position of educational services technician.

D. Order Defendants to make whole Plaintiff by providing compensation for past and future pecuniary losses resulting from the unlawful employment practices in amounts to be determined at trial.

E. Order Defendants to make whole Plaintiff by providing compensation for past and future nonpecuniary losses resulting from the unlawful practices complained of, including emotional distress, humiliation, anxiety, stress, embarrassment, feelings of stigmatization and degradation, anguish and loss of esteem, in amounts to be determined at trial.

F. Order Defendants to pay Plaintiff punitive damages for its malicious and reckless conduct in amounts to be determined at trial.

G. Award Plaintiff her costs and attorney's fees in this action.

H. Grant such further relief as the Court deems necessary and proper in the public interest.

COUNT II – ARIZONA CIVIL RIGHTS ACT

48. Plaintiff restates and incorporates by reference each of the allegations contained in paragraphs 1 through 47 above.

49. Plaintiff is a qualified handicapped individual within the meaning of the Arizona Civil Rights Act ("ACRA"), A.R.S. §41-1461(7).

50. The ACRA prohibits employers from committing unlawful employment practices which include, but are not limited to, discharging or otherwise discriminating against an individual with respect [sic] the terms, conditions or privileges of her employment because of handicap and discriminating against employees who oppose unlawful employment practices. *See, e.g.*, A.R.S. §41-1463(B); A.R.S. §41-1464(A).

51. The employment practices complained of in paragraphs 16 through 23 and 39 through 42 violated the Arizona Civil Rights Act.

52. The employment practices complained of in paragraphs 16 through 23 and 39 through 42 were intentional.

53. As a result of Defendant's discriminatory actions, Plaintiff Shelley Savage has suffered damages including, but not limited to, lost wages and pecuniary and nonpecuniary losses. The non-pecuniary losses Ms. Savage has suffered and continues to suffer include emotional distress, humiliation, anxiety, stress, embarrassment, feelings of stigmatization and degradation, anguish and loss of esteem.

Wherefore, Plaintiff respectfully requests that this Court:

A. Grant a permanent injunction enjoining Defendant GUHSD, its officers, successors, assigns, and all persons in active concert or participation with it, from engaging in discrimination in the terms and conditions of employment of its employees on the basis of disability, and any other employment practice which discriminates on the basis of disability, including retaliation.

B. Order Defendants to institute and carry out policies, practices, and programs which provide equal employment opportunities for qualified individuals with disabilities, and which eradicate the effects of its past and present unlawful employment practices.

C. Order Defendants to make whole Plaintiff by providing her back pay with prejudgment interest, in amounts to be determined at trial, and by other appropriate affirmative relief necessary to eradicate the effects of its unlawful employment practices, including but not limited to reinstatement to the position of educational services technician.

D. Order Defendants to make whole Plaintiff by providing compensation for past and future pecuniary

losses resulting from the unlawful employment practices in amounts to be determined at trial.

E. Order Defendants to make whole Plaintiff by providing compensation for past and future nonpecuniary losses resulting from the unlawful practices, including emotional distress, humiliation, anxiety, stress, embarrassment, feelings of stigmatization and degradation, anguish and loss of esteem, in amounts to be determined at trial.

F. Grant such further relief as the Court deems necessary and proper in the public interest.

G. Award Plaintiff her costs and attorney's fees in this action.

COUNT III – AMERICANS WITH DISABILITIES ACT

54. Plaintiff restates and incorporates by reference each of the allegations contained in paragraphs 1 through 53.

55. The employment practices complained of in paragraphs 16 through 23 and 39 through 42 violated Title I of the Americans with Disabilities Act.

56. The employment practices complained of in paragraphs 16 through 23 and 39 through 42 were intentional.

57. The unlawful employment practices complained of in paragraphs 16 through 23 and 39 through 42 were done with malice or with reckless indifference to the federally protected rights of Shelley Savage.

58. As a result of Defendant's discriminatory actions, Plaintiff Shelley Savage has suffered damages including, but not limited to, lost wages and pecuniary and nonpecuniary losses. The non-pecuniary losses Ms. Savage has suffered and continues to suffer include emotional distress, humiliation anxiety, stress, embarrassment, feelings of stigmatization and degradation, anguish and loss of esteem.

Wherefore, Plaintiff respectfully requests that this Court:

A. Grant a permanent injunction enjoining Defendant GUHSD, its officers, successors, assigns, and all persons in active concert or participation with it, from engaging in discrimination in the terms and conditions of employment of its employees on the basis of disability, and any other employment practice which discriminates on the basis of disability, including retaliation.

B. Order Defendants to institute and carry out policies, practices, and programs which provide equal employment opportunities for qualified individuals with disabilities, and which eradicate the effects of its past and present unlawful employment practices.

C. Order Defendants to make whole Plaintiff by providing her back pay with prejudgment interest, in amounts to be determined at trial, and by other appropriate affirmative relief necessary to eradicate the effects of its unlawful employment practices, including but not limited to reinstatement to the position of educational services technician.

D. Order Defendants to make whole Plaintiff by providing compensation for past and future pecuniary

losses resulting from the unlawful employment practices in amounts to be determined at trial.

E. Order Defendants to make whole Plaintiff by providing compensation for past and future nonpecuniary losses resulting from the unlawful practices complained of, including emotional distress, humiliation, anxiety, stress, embarrassment, feelings of stigmatization and degradation, anguish and loss of esteem, in amounts to be determined at trial.

F. Order Defendants to pay Plaintiff punitive damages for its malicious and reckless conduct in amounts to be determined at trial.

G. Award Plaintiff her costs and attorney's fees in this action.

H. Grant such further relief as the Court deems necessary and proper in the public interest.

JURY TRIAL DEMAND

Plaintiff requests a jury trial on all issues.

DATED this 8th day of August, 2001.

/s/ Dena Rosen Epstein
Dena Rosen Epstein
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Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Shelley Savage Plaintiff, vs. Glendale Union High School District No. 205 of Maricopa County Defendant.	CASE NO.: CIV 00-1546 PHX RCB **AFFIDAVIT OF EUGENE DUDO**

State of Arizona)
) ss.
County of Maricopa)

I, Eugene Dudo, upon my oath depose and say:

1. I am the Assistant Superintendent for Finance with the Glendale Union High School District. (the "district") and, in that capacity, I provide this Affidavit upon my personal knowledge and belief;

2. Pursuant to state statutory authority, property owners within the district are assessed property taxes for the support of public schools based upon a state-calculated formula that uses a qualifying tax rate for each school

district. This amount is statutorily set by the State legislature to $2.1265 per $100 of assessment of their property value;

3. During the 1999-2000 fiscal year, property owners within the district were taxed based on the state calculated formula and approximately $23 million was raised through property taxes;

4. Additional monies from property taxes were raised for the district pursuant to a desegregation agreement with the federal government as well as a voter approved override;

5. The district received approximately $32.8 million from the State of Arizona for the support of its public schools as part of the State's equalization assistance;

6. The district received approximately $2.3 million from Maricopa County for the support of its public schools;

7. The district received approximately $8 million from the federal and state grants for the support of its public schools;

8. The combined amounts (federal, state, county, and local funds) available in the district operating budget totaled approximately $4600 per student. Of this amount, the State's equalization assistance funds approximately $2400 per student (or more than 52%);

9. The district maintains only one (1) Maintenance and Operations Fund with the County Treasurer. All federal, state, county, and local funds are deposited and combined into that single Maintenance and Operations Fund as required by statute and by the State Auditor

General pursuant to the Uniform System of Financial Records;

10. The district also maintains incidentals funds as allowed by statute; for example, funds raised from book-store operations. These funds are not deposited with the County Treasurer, but instead are deposited with a local bank;

11. The district does not self-insure, but procures insurance from an authorized insurer approved by the Director of the Department of Insurance;

12. The insurance premiums are paid using the commingled funds deposited into the Maintenance and Operations Fund with the County Treasurer;

13. To the extent insurance coverage is available, any finding of liability resulting in a judgment in this lawsuit would be paid out of the insurance proceeds that were purchased with the commingled funds from the Maintenance and Operations Fund;

14. Annual legal expenses are also paid from the district's operations budget, which is funded with the commingled funds from the Maintenance and Operations Fund;

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Eugene Dudo
EUGENE DUDO

On this 20 day of July, 2001, before me, the undersigned Notary Public in and for the County of Maricopa, State of Arizona, personally appeared EUGENE DUDO, known to me to be or satisfactorily proven to me to be the person whose name is subscribed to the foregoing document

and acknowledged that he signed the same for the purposes therein contained.

IN WITNESS WHEREOF, I have hereunto set my hand and notarial seal.

/s/ Michael Cooney
Notary Public

My Commission Expires:
Dec. 10, 2004

[SEAL]
OFFICIAL SEAL
MICHAEL COONEY
Notary Public – State of Arizona
MARICOPA COUNTY
My Comm Expires:
Dec. 10, 2004

(2)

No. 03-1052

Supreme Court, U.S.
FILED
MAR 26 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

GLENDALE UNIFIED HIGH SCHOOL DISTRICT NO. 205 OF MARICOPA COUNTY,

Petitioner,

vs.

SHELLEY SAVAGE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether this Court should overrule longstanding precedent holding political subdivisions of the state are not entitled to Eleventh Amendment immunity from suit when the state treasury has no legal or practical liability for a money judgment against the political subdivision; and the political subdivision performs a local governmental function.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent respectfully requests this Court deny the Petition for a Writ of Certiorari seeking review of a decision by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1-29, is reported at *Savage v. Glendale Unified High School Dist. No. 205 of Maricopa Co.*, 343 F.3d 1036 (9th Cir. 2003). The ruling of the district court, Pet. App. 30-59, is unreported.

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals entered its opinion on September 10, 2003. Petitioner filed a Petition for Rehearing with a suggestion for rehearing en banc, both of which were denied. The petition for a Writ of Certiorari was filed on January 19, 2004. This Court's jurisdiction has been invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of

> the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const., amend. XI.

STATEMENT OF THE CASE

This case arises out of the termination of plaintiff Shelley Savage's employment relationship with defendant Glendale Union High School District ("the School District" or "GUHSD"). Shelley Savage, a disabled individual, was employed by the School District at Independence High School as an education services technician. The management at the high school informed Savage that she must affix a flagpole to her wheelchair in order to make herself more visible to students in the classroom. She objected to the request, informing the management staff she believed it to be discriminatory. Nevertheless, they continued to require that she comply. When Savage refused to put the flag and flagpole on her wheelchair, the School District terminated her employment. Savage subsequently filed a discrimination charge with the United States Equal Employment Opportunity Commission ("EEOC") and the Arizona Civil Rights Section of the Attorney General's office. The EEOC issued a determination letter, finding reasonable cause to believe that the School District had discriminated against Savage by subjecting her to discriminatory terms and conditions of employment, and then discharging her in retaliation for her opposition to the discriminatory terms. The EEOC then issued Savage a right to sue letter. Savage also received a right to sue letter from the Arizona Civil Rights Section of the Attorney General's office.

Savage filed suit in the United States District Court for the District of Arizona, claiming violations of Title I of the ADA, 42 U.S.C. §§ 12101 *et seq.*, 42 U.S.C. § 12203, Section 504 of the RA, 29 U.S.C. § 794, and the Arizona Civil Rights Act ("ACRA"), Ariz. Rev. Stat. §§ 41-1461 *et seq.* Savage seeks injunctive, compensatory and punitive relief.

The School District filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) arguing that Savage's claims under the ADA and RA are barred by the Eleventh Amendment because the School District is an arm of the state. The School District further argued that if the ADA claims and RA claims are dismissed, then the district court could not exercise supplemental jurisdiction over the ACRA claims. Both parties supplied affidavits and public documents in support of their positions regarding the motion to dismiss. After reviewing the arguments and documentation and applying the five part test set out in *Mitchell v. Los Angeles Community College District,* 861 F.2d 198, 201 (9th Cir. 1988), the district court concluded that the School District was not an arm of the state and therefore not entitled to sovereign immunity under the Eleventh Amendment. Because the district court determined that it had jurisdiction over the ADA and RA claims, it concluded that the exercise of jurisdiction over the ACRA claims was a proper exercise of supplemental jurisdiction and declined to dismiss them.

The School District filed an appeal with the Court of Appeals for the Ninth Circuit arguing that the ADA claims and RA claims are barred by the Eleventh Amendment. The question on appeal was whether an Arizona high school district was an arm of the state entitled to Eleventh

Amendment immunity from suit in federal court for alleged violations of the ADA and RA. The parties briefed the issue. The Arizona Education Association and the National Protection and Advocacy agency submitted amicus briefs on behalf of the Plaintiff. The Arizona School Board Association submitted an amicus brief on behalf of the Defendant GUHSD. The Ninth Circuit heard the oral argument of the parties. Applying the *Mitchell* factors, a panel of the Ninth Circuit unanimously held that an Arizona high school district is not an arm of the state for Eleventh Amendment immunity purposes.

REASONS FOR DENYING THE PETITION

I. This Court Should Deny Petitioner's Petition For A Writ Of Certiorari Review Because This Case Possesses None Of The Customarily Compelling Reasons, Which Warrant The Attention Of This Court.[1]

A. The Ninth Circuit applied this Court's well-established jurisprudence regarding Eleventh Amendment immunity in a manner consistent with this Court's prior decisions. This Court's longstanding precedent has established that political subdivisions of the state (counties,

[1] Traditionally, this Court has also granted certiorari review when a federal question is answered by a state court of last resort in conflict with another state court of last resort or a federal court of appeals. *See e.g., Baldwin v. Alabama,* 472 U.S. 372, 374 (1985); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 753 n.1 (1985). The instant case, however, was filed in federal district court and does not arise from a state court. As this case created no such conflict that warrants this Court's attention, Respondent does not discuss this factor.

municipal corporations and entities such as school districts that resemble counties and municipal corporations) are not entitled to Eleventh Amendment immunity. *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890); *Moor v. County of Alameda*, 411 U.S. 693, 717-21 (1973); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 123 n.34 (1984); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 369 (2001) ("the Eleventh Amendment does not extend its immunity to units of local governments"). In contrast, arms of the state (state entities that are so much a part of the state that they are entitled to the sovereignty of the state itself) are immune.

This precedent, dating back more than 110 years, establishes that the Eleventh Amendment only serves to immunize state governments, not local entities. *Luning*, 133 U.S. at 530; *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979) ("consistently [this Court has] refused to construe the [Eleventh] Amendment to afford protection to political subdivisions . . . even though such entities exercise a 'slice of state power'"); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 35 (1994) ("Political subdivisions exist solely at the whim and behest of their State, yet cities and counties do not enjoy Eleventh Amendment immunity.").

Although determining an entity's status is a question of federal law, that determination can only be made after considering the provisions of state law that define the entity's character. *Regents of the University of California v. Doe*, 519 U.S. 425, 430 (1997); *Mt. Healthy*, 429 U.S. at 280. Writing for the Court, Chief Justice Rehnquist concluded the following factors were significant in determining Ohio school districts were not an arm of the state. Ohio

school districts are defined as political subdivisions in state law, have extensive powers to bond and levy taxes, and are one of many local school boards. Thus, even though the state gave a significant amount of money to the school district and exercised guidance over the districts, this Court found that Ohio school districts were not entitled to assert Eleventh Amendment immunity as they were more like a county or city than an arm of the state. *Mt. Healthy,* 429 U.S. at 280.

Since *Mt. Healthy*, the Ninth Circuit adopted a five factor test to determine whether an entity is an arm of the state. *See Mitchell,* 861 F.2d 198. In this case, the Ninth Circuit concluded that an Arizona high school district was not an arm of the state after examining the five *Mitchell* factors: 1) whether a money judgment would be satisfied out of state funds; 2) whether the entity performs central governmental functions; 3) whether the entity may sue or be sued; 4) whether the entity has the power to take property in its own name or only the name of the state; and 5) the nature of the corporate status of the entity. *Mitchell,* 861 F.2d at 201.

The Ninth Circuit's application of the *Mitchell* factors in this case is consistent with *Mt. Healthy* and intervening authority from this Court. The Ninth Circuit correctly applied the first *Mitchell* factor – whether a judgment will affect the state treasury – as it has been clarified by this Court to mean whether the state is legally or practically liable for a monetary judgment against the entity. *Doe,* 519 U.S. at 430-31 (" . . . it is the entity's potential legal liability . . . that is relevant."); *Hess*, 513 U.S. at 51 ("If the expenditures of the enterprise exceed receipts, is the state obligated to bear and pay the resulting indebtedness of the enterprise? When the answer is 'No' – both legally and

practically – then the Eleventh Amendment's core concern is not implicated."). The Ninth Circuit analyzed the four remaining factors so as to determine that the dignity of the sovereign State of Arizona was not affected by a suit against the Arizona high school district. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996); *Hess*, 513 U.S. at 40-41.

The Ninth Circuit's analysis of Arizona school districts does not depart from this Court's well-established precedent. Since this Court held in *Mt. Healthy* that an Ohio school board was not an arm of the state entitled to Eleventh Amendment immunity, most courts of appeals have, after a review of state law, held that the school districts or boards in their jurisdiction were local governmental units and not arms of the state.[2] *See Holz v. Nenana City Public School District,* 347 F.3d 1176, 1189 (9th Cir. 2003) (Alaska); *Eason v. Clark County Sch. Dist.,* 303 F.3d 1137 (9th Cir. 2002) (Nevada); *Cuesta v. Sch. Bd. of Miami-Dade County*, 285 F.3d 962, 966 (11th Cir. 2002) (Florida); *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219 (4th Cir. 2001) (North Carolina); *Duke v. Grady Mun. Sch.*, 127 F.3d 972 (10th Cir. 1997) (New Mexico); *Ambus v. Granite*

[2] All circuits apply a variety of factors, all of which are consistent with *Mt. Healthy*, in determining whether an entity is an arm of the state. The various factors examine how state law created and treats the entity in question. Compare the Ninth Circuit's *Mitchell* factors to the Tenth Circuit two factor test: "The court first examines the degree of autonomy given to the agency, as determined by the characterization of the agency by state law and the extent of guidance and control exercised by the state. Second, the court examines the extent of financing the agency receives independent of the state treasury and its ability to provide for its own financing." *Duke,* 127 F.3d at 974, citing *Watson v. University of Utah Med. Ctr.,* 75 F.3d 569, 574-75 (10th Cir. 1993).

Bd. of Educ., 995 F.2d 992 (10th Cir. 1993) (Utah); *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1509-11 (11th Cir. 1990) (Alabama); *Lester H. v. Glthool*, 916 F.2d 865, 870-71 (3rd Cir. 1990) (Pennsylvania); *Rosa R. v. Connelly*, 889 F.2d 435, 437-38 (2nd Cir. 1989) (Connecticut); *Lopez v. Houston Indep. Sch. Dist.*, 817 F.2d 351, 353 (5th Cir. 1987) (Texas) (citing *Kingsville Indep. Sch. Dist. v. Cooper*, 611 F.2d 1109, 1112 (5th Cir. 1980)), overruled on another ground by *Walton v. Alexandar*, 44 F.3d 1297 (5th Cir. 1995); *Fay v. S. Colonie Cent. Sch. Dist.*, 802 F.2d 21, 27 (2nd Cir. 1986) (New York); *Minton v. St. Bernard Sch. Bd.*, 803 F.2d 129, 131-32 (5th Cir. 1986) (Louisiana); *Gary A. v. New Trier High Sch. Dist. No. 203*, 796 F.2d 940, 945 (7th Cir. 1986) (Illinois); *Stoddard v. Sch. Dist. No. 1, Lincoln County*, 590 F.2d 829 (10th Cir. 1979) (Wyoming); *Unified Sch. Dist. No. 480 v. Epperson*, 583 F.2d 1118, 1121-23 (10th Cir. 1978) (Kansas); *Adams v. Rankin County Bd. of Educ.*, 524 F.2d 928, 929 (5th Cir. 1975) (Mississippi). But *see Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248 (9th Cir. 1992) (California); *De Levay v. Richmond County Sch. Bd.*, 284 F.2d 340 (4th Cir. 1960) (Virginia).

B. There is no conflict that exists between federal circuit courts regarding applicability of Eleventh Amendment immunity. Petitioner misrepresents that this case has created a circuit split between the Ninth and Tenth Circuit Courts of Appeals, worthy of Supreme Court attention. Pet. Br. 25.

Petitioner does *not* argue that the Ninth and Tenth Circuits applied conflicting or incompatible tests to answer the same federal question, which if true, may warrant this Court's attention. *McElroy v. United States,* 455 U.S. 642, 643 (1982). In fact, the Ninth and Tenth Circuits have

each adapted this Court's guidance in *Mt. Healthy* into very similar multi-factor tests to assess the applicability of Eleventh Amendment immunity.[3] *See Mitchell,* 861 F.2d at 201 and Pet. App. 5-6.

Instead, Petitioners move for certiorari because they claim the Ninth and Tenth Circuits do not pay equal deference to state court decisions regarding state law. Pet. Br. 28-29. They contrast the Tenth Circuit's wholesale adoption to the New Mexico Supreme Court's decision in *Daddow v. Carlsbad Mun. Sch. Dist.,* 898 P.2d 1235 (N.M. 1995) with the Ninth Circuit's analysis of the Arizona Supreme Court's decision in *Roosevelt Elementary Sch. Dist. Number 66 v. Bishop,* 877 P.2d 806 (Ariz. 1994).

1. Whereas, New Mexico's court of last resort has ruled specifically that Eleventh Amendment immunity does not apply to New Mexico schools, Arizona's court of last resort has never addressed whether Arizona schools are entitled to Eleventh Amendment immunity. In *Daddow,* the New Mexico Supreme Court squarely addressed a federal question: whether New Mexico school districts were arms of the state and possessed the shield of Eleventh Amendment immunity. The New Mexico Supreme Court applied this Court's guidance in *Mt. Healthy* to its evaluation of the state's educational funding system and decided that New Mexico law did not treat schools as arms of the state and, therefore, public schools were not entitled to immunity. *Daddow,* 898 P.2d at 1242. Two years later, in *Duke v. Grady Mun. Sch.,* the Tenth Circuit adopted the

[3] Compare the *Mitchell* factors to the Tenth Circuit's two factor test. The Tenth Circuit engages in two general inquires at n.2.

Daddow court's reasoning and held that New Mexico school districts do not have Eleventh Amendment immunity. 127 F.3d 972.

Unlike *Daddow,* the question in *Roosevelt* was exclusively a matter of state law: whether Arizona's mechanism for financing capital improvements for public schools violated the state constitution. 877 P.2d 806 (1994). The court held only that the state's method of funding capital improvements violated the General and Uniform Clause of the Arizona Constitution. *Id.* In reaching its decision, the Arizona Supreme Court *never* concluded, examined, or mentioned whether public schools were arms of the state. Thus, the Ninth Circuit made no error when it did not recognize *Roosevelt* to impart authority regarding Eleventh Amendment immunity.

2. An astute reading of Petitioner's cited case law reveals that the Tenth Circuit's treatment of *Daddow* is incomparable to the Ninth Circuit's treatment of *Roosevelt.* Petitioner takes the position that *Roosevelt's* narrow decision about a state constitutional law question is tantamount to answering a federal constitutional question about Eleventh Amendment immunity. However, *Roosevelt* cannot be authority for an issue it never addressed. Whereas the Tenth Circuit had specific guidance by a state court of last resort about how the state treated public schools for purposes of Eleventh Amendment immunity, no such guidance has been rendered by an Arizona court.

Moreover, the *Roosevelt* court supports the Ninth Circuit's decision that public schools are not arms of the state under Arizona law. The Arizona Supreme Court regarded school districts as mere "political subdivisions" of the state, writing:

> . . . local political subdivision can go above and beyond the statewide system [of financing capital improvements]. Disparities caused by local control do not run afoul of the state constitution because there is nothing in Art. XI [of the Arizona Constitution] that would prohibit a school district or a county from deciding for itself that it wants an educational system that is even better than the general and uniform system created by the state.

Id. at 814-815. Because, the Arizona Supreme Court does not hold school districts and counties to the same state constitutional obligations as the state, *Roosevelt* actually bolsters the Ninth Circuit's conclusion that public schools in Arizona are not arms of the state and, therefore, not immune from suit in federal courts. Pet. App. 20.

3. The Ninth Circuit's decision in *Belanger* does not warrant a grant of certiorari because it merely reflects that California law treats California schools differently than Arizona. Petitioner argues the Ninth Circuit decision in this case results in an anomaly in the circuit, because in *Belanger* it concluded that California school districts are arms of the state entitled to Eleventh Amendment immunity while Arizona school districts are separate political subdivisions not entitled to immunity. Pet. Br. 14-15. Petitioner implies an intra-circuit split. Intra-circuit splits do not generally warrant a grant of certiorari. Moreover, this decision does not create either an anomaly or intra-circuit split. In *Belanger*, the Ninth Circuit analyzed the *Mitchell* factors and distinguished the California school districts from the school districts presented in *Mt. Healthy*. The court found persuasive that in California, the state has uniquely assumed responsibility for and control over school funding. As a result, the court found local

California school districts are agents of the state itself. In California:

> [t]he state sets a revenue limit for each school district based on average attendance, subtracts property tax revenues from that limit, and allocates the balance to the school district from the state school fund. In short, the state determines the amount of money that school districts may spend per pupil and then provides the necessary state funds.

Belanger, 963 F.2d at 252.

By virtue of this revenue limit system, state and local revenue is commingled in a single fund under state control, and local tax revenue lost to a judgment must be supplanted by the interchangeable state funds already in the district budget. Thus, as the Ninth Circuit states, in California, any use of commingled funds is a use of state funds. The Ninth Circuit, however, is careful to point out that "[i]n the critical area of school funding . . . California has selected a different path from that of most states." *Id.* at 254. A comparison of *Belanger* and this case reveals how, in the application of consistent *Mitchell* factors, results may vary depending on how an entity is created by state law. A different conclusion following the analysis of how state laws treat Arizona and California schools, respectively, does not reveal an inter-circuit split or an anomaly within the Ninth Circuit. Instead, it suggests a working method of examining applicability of Eleventh Amendment immunity.

Moreover, since *Belanger*, the Ninth Circuit has also examined how state law treats Alaska school districts and Nevada school districts. The Ninth Circuit concluded that neither Alaska school districts nor Nevada school districts enjoy Eleventh Amendment immunity because they are not arms of the state and do not share the same controlling

characteristics as California. *Holz,* 347 F.3d at 1189 (Alaska); *Eason,* 303 F.3d at 1144 (Nevada). These decisions further support that California has taken a different path in its centralized control and funding of its schools than most states.

C. The Ninth Circuit's decision does not present a direct conflict with a decision of the Arizona Supreme Court. Petitioner feigns a conflict between this case and the Arizona Supreme Court's decision *Roosevelt* as applied to the first *Mitchell* factor – whether the state is legally and practically liable for a money judgment against the entity – and second factor – whether the entity performs a centralized government function. Pet. Br. 14, 19-21. There is no direct conflict because the Arizona Supreme Court has not addressed the federal question of whether an Arizona school district is entitled to Eleventh Amendment immunity. Rather, the state supreme court in *Roosevelt* addressed whether Arizona's then existing school finance system satisfied the general and uniform requirement of the education article in the state constitution. As part of its analysis the Arizona Supreme Court discussed the relationship between political subdivisions of local school districts and the state which the Ninth Circuit carefully considered.

With respect to the first factor, Petitioner argues that the Ninth Circuit improperly ignores *Roosevelt* and instead incorrectly relies upon several Arizona statutes which provide the mechanism by which liabilities that exceed the budget may be funded. *See* Ariz. Rev. Stat. 15-907.[4] Pet. Br. 22-25. However, the argument is unavailing

[4] Petitioner presents two conflicting views about the state of Arizona law regarding financing of public schools. Here, the Petitioner argues that Arizona has not sufficiently reformed its current public

(Continued on following page)

because after *Roosevelt,* Arizona altered its public school financing system to a system which now passes constitutional muster. In response to the *Roosevelt* case, the state legislature passed the 1998 version of Students First legislation. Subsequently, the Arizona Supreme Court issued an order declaring that the new law was facially valid and that there were no pending constitutional challenges to the public school financing statutes.[5] Unfortunately, Petitioners fail to note that it was this post-reform system that the Ninth Circuit examined to reach its conclusion in this case. Instead, Petitioner asks this Court to construe state statutes upon which the Ninth Circuit relied as unconstitutional when the Arizona Supreme Court has spoken clearly that the current public school financing system is constitutional. In light of the Supreme Court's declaration, Petitioners fail to point out any subsequent authority from the Arizona Supreme

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school financing system in Arizona to comply with *Roosevelt*. Petitioner also argues that certiorari should be granted because clarification is needed to give guidance about how to determine whether a school district is an arm of the state in a state that has undergone reform. Pet. Br. 7.

[5] *Roosevelt* led to the passage of a revised Students First legislation which was passed and later enacted in July, 1998. An earlier version of the Students First legislation passed in April, 1998, but was declared unconstitutional because it did not meet all of the standards set forth in *Hull v. Albrecht*, 190 Ariz. 34, 37, 960 P.2d 634, 637 (1998). After the state legislature passed the 1998 version and following a joint motion from the parties in *Roosevelt*, the Arizona Supreme Court issued an order declaring that the new law was facially valid and that there were no pending constitutional challenges to the public school financing statutes, and vacated all orders which had prohibited the distribution of funds to the public schools. Resp. App. 1-2.

Court to the contrary.[6] Certiorari is not justified for this reason as it is the primary responsibility of state courts of last resort to adjudge the validity of state statutes in light of state constitutions.

Regarding the second factor, Petitioner claims that *Roosevelt* requires the state be the preeminent governmental unit responsible for educating children and therefore, the Ninth Circuit erred in concluding that school districts do not perform central government functions. Pet. Br. 11-12. The Ninth Circuit attentively reviewed *Roosevelt* before rejecting Petitioner's argument. Specifically, the Ninth Circuit noted:

> *Roosevelt* was concerned with the state's constitutional responsibility to establish and maintain a 'general and uniform public school system,' a responsibility the Arizona Supreme Court determined the state had been shirking . . . Thus, the

[6] Petitioner cites *Tanque Verde Unified Sch. Dist. No. 13 of Pima County v. Bernini* for the proposition that any damages resulting from litigation must be funded by the state treasury and that a school district can not use other funds to pay such damages. 76 P.3d 874 (Ariz. Ct. App. 2003) Pet. Br. 24. The Arizona Court of Appeals does not rule so in its opinion. Rather, the Arizona Court of Appeals addressed a more narrow question: whether funds issued by the state facility funds board to a school district to acquire property for a new school could be used to pay any severance damages required in a condemnation action. The funds from the state facilities board are not the same funds used in the maintenance and operation budget. The Arizona Court of Appeals held only that a school district was not prohibited from using these funds issued by the state facilities board to pay for a severance damage necessary for acquiring a school site. *Tanque Verde*, 76 P.3d at 888. The court did not hold that schools were prohibited to using their own funds; nor did it issue any opinion about the use of funds under the maintenance and operation budget.

> Arizona Supreme Court concluded that while the legislature could delegate 'some of its authority to other political subdivisions of the state to help finance public education,' nothing in the constitution 'allows the state to delegate its responsibility under the constitution.' The *Roosevelt* decision led to the establishment of a capital financing scheme that provides state funds for improvements in school facilities. *Yet nothing in Roosevelt suggests that actually running the schools is a constitutionally-mandated state function.*

Pet. App. 20 (emphasis added).

The Ninth Circuit reached a reasoned conclusion that Arizona school districts actually run the local schools and provide education because of the slice of power granted it by statute and condoned by the Arizona Supreme Court. Pet. App. 14-17. The Ninth Circuit so concluded after citing numerous Arizona statutes granting local control to operate the schools[7]: "This system of delegation is more weighted towards localized control than the anomalous centralized California system described in *Belanger*." Pet. App. 16. Undoubtedly, Arizona has the authority to change how large of a slice of power it gives to local entities, such as local school districts and counties, to run the schools. Arizona may chose to reform a system so as to take the slice of power from political subdivisions and have a state-operated, centralized system of schools. However, that is not what Arizona chose to do when it reformed the system, as the Ninth Circuit recognized. Pet. App. 29.

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[7] For list of those statutes, *see* Resp. Br. 20-22.

Although Petitioners disagree with the Ninth Circuit's interpretation of *Roosevelt*, the Ninth Circuit reached a reasonable and permissible result about how state law treats school districts. The Ninth Circuit's interpretation of state laws of Arizona does not warrant a grant of certiorari. *The Wharf (Holdings) Ltd. v. United International Holdings Inc.*, 532 U.S. 588, 596 (2001) (declined to review whether Securities Exchange Act covered oral contract of sale where it may have been unenforceable under state law because a state law question); *also see Oklahoma Tax Comm'n v. Chicksaw Nation*, 515 U.S. 450, 461-62 (1995) (Court's practice is to accept a reasonable construction of state law by the court of appeals.)

D. This case does not present any important issue of federal law which has not been decided by this court. Petitioner asserts that certiorari should be granted because this Court's guidance is needed to determine whether an entity is an arm of the state for Eleventh Amendment immunity purposes when there has been school financing reform based on an enabling act and state constitutional provisions. Pet. Br. 7. Petitioner's reason does not warrant a grant of certiorari. There is no need for additional guidance simply because a state has undertaken school financing reform. Under established authority, this Court has instructed lower courts to examine how state law treats the entity in question. When there has been reform to the state's school financing system that affects one or more of the factors, then the court will examine the relevant amended state law as part of its analysis under this Court's established precedent including *Mt. Healthy, Hess, Lake Country Estates, Doe* and *Seminole Tribe*.

The Ninth Circuit's recent examination of whether an Alaska city school district was an arm of the state exemplifies how reform may affect a *Mitchell* factor. *Holz*, 347 F.3d at 1186-87. Until 1979, Alaska had a state-operated school system in which the state provided education and operated schools. *Holz*, 347 F.3d at 1186. In 1979, the state dismantled the state-operated system in favor of one in which local entities provided the education to students. *Holz*, 347 F.3d at 1186. Certainly, such a change would affect the multi-factor analysis of Eleventh Amendment immunity under established authority. However, the multi-factor test need not change to accommodate reform. Moreover, established authority about determining whether an entity is an arm of the state is flexible enough to evaluate very different entities. *See generally*, *Mt. Healthy* (school district); *Mitchell* (community college district); *Hess* (transportation authority); *Lake Country Estates* (regional planning agency). Consequently, additional guidance is not needed to evaluate one particular type of entity subjected to the multi-factor approach.

Here, when addressing the first *Mitchell* factor regarding whether the state was legally or practically liable for a judgment against GUHSD, the Ninth Circuit carefully considered the current financing system. Resp. Br. 13-14, n.5. The system the Ninth Circuit considered has passed state constitutional muster following the *Roosevelt* holding that the previous system was unconstitutional. Pet. App. 7-13.

Contrary to Petitioner's assertion, established precedent provides the needed guidance because reform itself does not alter the test for determining whether an entity is an arm of the state. However, reform may change how state law treats the entity in question with respect to the

factors considered in the analysis. Therefore, reform may affect the outcome of one or more of the *Mitchell* factors, depending upon the nature of, type and extent of reform to an entity.

II. Certiorari Is Not Warranted As The Ninth Circuit, Consistent With This Court's Precedents, Correctly Held That Petitioner GUHSD Is Not An Arm Of The State Shielded From Eleventh Amendment Immunity.

The Ninth Circuit correctly applied this Court's precedents in finding Petitioner GUHSD is a political subdivision of the State of Arizona rather than an arm of the State of Arizona. The Ninth Circuit did so by applying the *Mitchell* factors which are consistent with the decisions of this Court. In reaching its ruling, the Ninth Circuit considered the following.

A. The Ninth Circuit concluded that the state treasury was not vulnerable to a money judgment, finding the statutory scheme closer to Nevada's school districts than California's school system. Pet. App. 13. After a review of state statutes affecting funding of local school districts, the Ninth Circuit concluded that the maintenance and operation funds that would be used to pay a money judgment to Savage are not subject to state control, are not subject to a *Belanger-style* cap, and will not be replenished with money out of the state treasury. Pet. App. 12-13. *See also* Resp. App. 13-16. In doing so, the Ninth Circuit correctly rejected Petitioner's argument that the Arizona state treasury would supplant funds spent on a money judgment against GUHSD. The Ninth Circuit relied on the following statutory provisions contrasting

Arizona to California's funding system: Ariz. Rev. Stat. §§ 15-210; 15-971; 15-907; 15-905 and 15-481.

Notably, the Ninth Circuit found that Ariz. Rev. Stat. § 15-907 provides that "[i]n the event of excessive and unexpected legal expenses . . . the governing board of the school district may petition the county superintendent . . . requesting authority to incur liabilities in excess of the amount the governing board deems necessary." Pet. App. 13, n.3. Specifically, Ariz. Rev. Stat. § 15-907(E) provides that such excess shall not be included in the computation of state aid for education. Pet. App. 13, n.3; *see also* Resp. App. 15-16. Therefore, state dollars cannot supplant the additional amount authorized by the county superintendent. The amount of state equalization assistance would remain unchanged as a result of a local school district getting approval to exceed the budget. Under Ariz. Rev. Stat. § 15-907 school districts are not required to obtain a voter approval to increase the tax rate. However, school districts may also raise additional expenses to exceed their budget through a voter override. Pet. App. 13, n.3.

B. The Ninth Circuit found that Arizona school districts were not performing a central government function. Rather, school districts in Arizona provide for the public education within their boundaries and enjoy a substantial degree of autonomy under Arizona law. Pet. Br. 22. The Ninth Circuit, consistent with this Court, examined how state law treats school districts and found that numerous statutes give local school districts wide discretion to manage public schools. Pet. App. 13-17. The Ninth Circuit considered how Arizona law, like the law of most states, grants local school districts enormous autonomy in the management of public education, finding that Arizona school districts: (1) manage and control school

property in the district, Ariz. Rev. Stat. § 15-341(A)(4); (2) set curricula; Ariz. Rev. Stat. § 15-341(A)(6); (3) establish criteria for high school graduation; Ariz. Rev. Stat. § 15-701.01(B)(2); (4) select either a year-round or traditional school calendar; Ariz. Rev. Stat. § 15-341(A)(2); (5) construct school property, with voter approval; Ariz. Rev. Stat. § 15-341(a)(8); and (6) furnish, repair and insure school property; Ariz. Rev. Stat. § 15-341(A)(7). Pet. App. 14.

Despite that the Arizona Board of Education sets statewide standards – as do many states – it is the local school districts which have discretion whether to appoint an attendance officer, Ariz. Rev. Stat. § 15-804; and adopt their own policies regarding excuse of pupils from school attendance for religious purposes, Ariz. Rev. Stat. § 15-806. The provision for the expulsion of unruly students gives substantial discretion to the School Districts concerning whether or not to expel or readmit a student, whether to admit a student expelled by another educational institution, or whether to reassign a student to an alternative educational program. Ariz. Rev. Stat. § 15-841. Additionally, the state grants school districts power to "[p]rescribe and enforce policies and procedures for the governance of the schools" provided they are consistent with state law. Ariz. Rev. Stat. § 15-341(A)(1). Local districts can manage and control school property in the district, Ariz. Rev. Stat. § 15-341(A)(4); acquire books, supplies and furniture; Ariz. Rev. Stat. § 15-341(A)(5); make conveyances of school property, Ariz. Rev. Stat. § 15-341(A)(9); and prescribe curricula and criteria for promotion and graduation provided it meets state guidelines, Ariz. Rev. Stat. § 15-341(A)(6); and select textbooks and supplemental textbooks for common schools and high schools. Ariz. Rev. Stat. §§ 15-721 & 15-722.

Thus, Arizona's system is more heavily weighted towards localized control than the anomalous centralized California system described in *Belanger*. Pet. App. 15-16.

C. Regarding the third *Mitchell* factor, the Ninth Circuit held that Arizona school districts may sue or be sued in their own name because under Arizona law, Arizona school districts are explicitly granted the power to sue or be sued in their own name. Ariz. Rev. Stat. § 15-326(1). Pet. App. 22-23.

D. The Ninth Circuit also held that the fourth *Mitchell* factor weighed against Eleventh Amendment immunity because Arizona school districts are empowered by statute to "[h]old and convey property for the use and benefit of the district." Ariz. Rev. Stat. § 15-326(2). Additionally, they may furnish, repair and insure school property, Ariz. Rev. Stat. § 15-341(A)(7); make conveyances of district property in the name of the district, Ariz. Rev. Stat. § 15-341(A)(9); and purchase school sites with voter authorization, Ariz. Rev. Stat. § 15-341(A)(10). Pet. App. 23-24.

E. In the final *Mitchell* factor the Ninth Circuit relying upon the analysis in *Mt. Healthy,* held that the status of the school district also weighed against a shield of immunity because of how Arizona law treated school districts. Pet. App. 26. As did this Court in *Mt. Healthy*, the Ninth Circuit relied upon the definition of school districts as political subdivisions with geographic boundaries organized for the purpose of the administration, support, and maintenance of the public schools or an accommodation school. Ariz. Rev. Stat. § 15-101(20). Pet. App. 25-26. Consistent with *Mt. Healthy*, the Ninth Circuit noted the significance of the fact that the law's definitions

of "state" did not include "school district." *See* Ariz. Rev. Stat. §§ 12-348(I)(3); 12-820(7); 35-466(6); 38-842(26); 38-797(13).

Accordingly, because all five *Mitchell* factors indicate that Arizona schools are not agents of the state for Eleventh Amendment purposes, the Ninth Circuit correctly affirmed the district court's decision not to dismiss the complaint for lack of subject matter jurisdiction.

CONCLUSION

For the reasons set forth herein, the Petition for A Writ of Certiorari should be denied.

Respectfully submitted,

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SUPREME COURT OF ARIZONA

GOVERNOR JANE DEE HULL,

Intervenor/Petitioner,

v.

HON. REBECCA A. ALBRECHT, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa,

Respondent Judge,

and

ROOSEVELT ELEMENTARY SCHOOL DISTRICT NO. 66, et al.; LISA GRAHAM KEEGAN, Superintendent of Public Instruction; STATE BOARD OF EDUCATION; STATE OF ARIZONA,

Real Parties in Interest.

GILBERT UNIFIED SCHOOL DISTRICT NO. 41; MURPHY ELEMENTARY SCHOOL DISTRICT NO. 21; PHOENIX UNION HIGH SCHOOL DISTRICT NO. 320; JOHN J. HESTER; DUANE STANDAGE; WILLIAM EMORY GRIMES, KAREN C. MOORE; MADISON ELEMENTARY SCHOOL DISTRICT NO. 38; SCOTTSDALE UNIFIED SCHOOL DISTRICT NO. 48; PHOENIX ELEMENTARY SCHOOL DISTRICT NO. 1; PARADISE VALLEY UNIFIED SCHOOL DISTRICT NO. 69; PENDERGAST ELEMENTARY SCHOOL DISTRICT NO. 92,

Intervenors.

) Supreme Court
) No. CV-98-0238-SA
)
) Maricopa County
) No. CV 91-13087
)
) ORDER
)
) (Filed Jul. 20, 1998)

This matter came to the court as an original special action. After considering the written briefs and oral arguments of the parties, the court issued its written opinion on June 15, 1998.

The petitioner and real parties in interest have now filed a joint motion in which they agree that the school finance legislation signed into law by the petitioner on July 9, 1998 is facially valid and, therefore, that no constitutional challenges to the statutes remain pending.

It thus appears to the court, there being no constitutional questions before us, the matter is now moot.

NOW, THEREFORE, IT IS ORDERED vacating the 60-day time limit established by this court in its June 15, 1998 opinion within which the state was permitted to distribute funds to the public school system.

IT IS FURTHER ORDERED vacating any and all orders of the Maricopa County Superior Court prohibiting the state from distributing funds to the public school system.

IT IS FURTHER ORDERED that the respondent judge shall terminate Maricopa County Superior Court Cause No. CV-91-13087, after first disposing of ancillary tasks necessary to accomplish termination.

DATED this 20th day of July, 1998.

/s/ Thomas A. Zlaket
Thomas A. Zlaket, Chief Justice

Dena Rosen Epstein, State Bar #015421
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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Shelley Savage, Plaintiff, v. Glendale Union High School District No. 205 of Maricopa County, Defendant.	)	No. CIV 00-1546 PHX RCB **AFFIDAVIT OF CHARLOTTE D. BORCHER IN SUPPORT OF PLAINTIFF'S SUPPLEMENTAL RESPONSE TO GUHSD'S REPLY**
STATE OF ARIZONA COUNTY OF PIMA	)	ss.

I, Charlotte D. Borcher, being duly sworn, upon my oath state as follows:

PROFESSIONAL EXPERIENCE

1. I earned a Bachelors of Science in Education from the University of Akron in Akron, Ohio in 1967. In 1985, I also completed a Masters of Arts in Education Administration from Northern Arizona University. I am certified by the Arizona Department of Education to work in Secondary

Teaching, as a Kindergarten through 12th grade Principal and as a Superintendent.

2. I have worked for over 30 years in public education and the administration of public education in a variety of positions. I currently work as a school finance and administrative consultant to Arizona school districts and have worked in this capacity for more than 10 years. I have also worked for two Arizona school districts as an Assistant Superintendent and Business Manager for more than 9 years. For one and a half years, I served as Business Administrator and Assistant Superintendent for Business Services for Scottsdale Unified School District. Specifically, I was hired to correct irregularities in business and procurement functions under an Attorney General Consent Decree. I also was employed by the Arizona Department of Education for seven years in several positions, including the Director of School Finance and the Director of Teacher Certification. I was a consultant to the Arizona Senate when a number of reforms were being made to the public school financing system. I have had additional experience in public school education and administration of public schools which is detailed in my resume. (Attachment A).

3. In the various professional positions, my areas of responsibility or areas for which I have been consulted include, but are not limited to: business and financial operations, facilities construction and renovation, facilities maintenance, transportation, material services, technology services, demographics and enrollment projections and elections.

4. In both my experiences as a consultant and financial manager for school districts, I have prepared

budgets for school districts, been involved in the ongoing management of school districts' financial resources, prepared for and provided oversight to school districts in conducting bond elections related to funding of school districts' budgets.

AN OVERVIEW OF ARIZONA'S PUBLIC SCHOOL FINANCING SYSTEM

5. Local governing boards set the budgets for local school districts and oversee the administration of the districts' finances as they relate to maintenance and operation, including but not limited to: salaries, benefits, supplies, purchased services, such as legal fees and costs and all other expenses related to the general operation of a school district.

6. Under Arizona's public school financing system, the local school district, counties, state and federal government fund the education of Arizona's children.

7. All operational expenses except for new construction, necessary upgrades to physical facilities which fall below minimum state standards, and major repairs are financed under the following system.

8. To determine how much the state may provide in state funding to a school district, a calculation is done to determine how much a qualifying tax rate will generate in a district. The qualifying tax rate is set by the state. For example, $2.0647 per hundred of assessed valuation will be the qualifying tax rate used in the next fiscal year. The difference between the amount generated by the qualifying tax rate and what has been calculated to be the district's

budget limit is the amount of equalization assistance provided.

9. If a local school district's qualifying tax rate generates more than is needed to fund the budget limit, then the district receives no equalization assistance. If a local school district's qualifying tax rate generates less than is needed to fund the budget limit, then the district receives an amount of equalization assistance equal to the amount of deficit.

10. The state legislature sets a base support level amount which is a guaranteed amount for each student. The student count is derived from either the Average Daily Membership ("ADM") or an adjusted ADM. The district's ADM becomes the student count for next year's budget.

11. The original amount for the base support level for a student was set by the legislature in 1979-80. The base support level amount has been increased annually (although some years it has stayed at the same level). Additionally, a school district's base support level may be increased for specific factors that may exist in a school district. For example, a higher base support level is available to school districts for teacher compensation where there is a proper evaluation system in place or for districts that have career ladder programs for teachers.

12. The various student counts are then weighted. Every student in the student count is counted 1.0 times. However, students in kindergarten through grade 8 are counted at a weighted amount of 1.158; students in high school are counted at a weighted amount of 1.268; and disabling conditions result in additional and varying weights per student.

13. All these weights are multiplied by the various student counts. The total of the weighted student counts is then multiplied by the base level amount guaranteed for each student in the student count to yield the base level funding for the student count in that district.

14. Added to the base level amount guaranteed for the student count of a district are amounts for the transportation budget level, soft capital and unrestricted capital budget. The transportation budget level is an amount calculated based on the number of approved route miles and number of qualified students transported by the district. The soft capital and unrestricted budget levels are calculated by multiplying the student count by a specific dollar amount determined by the state.

15. Equalization assistance is made up of state and county funds.

16. The majority of school districts receive at least some equalization assistance from the county and state. Some local school districts, however, do not receive any equalization assistance and some unified local school districts do not receive equalization assistance for their elementary schools.

17. Local school districts may spend more than the limits set for the Base Support Level for education in their district if it can raise the additional funds through voter approved override elections. There are some restrictions on the amount that a district can seek in a voter override election. School districts can also spend more than the limits set for the Base Support Level, Transportation Control Limit and Capital Outlay Revenue Limit, for various reasons including but not limited to, the school district is under a desegregation order, has generated

funds by selling or leasing school facilities, has excess utilities costs, or qualifies as a small school district.

18. Local school districts do not maintain funds in their own accounts, except for student activity funds and auxilliary operation funds.

DUTIES OF COUNTY TREASURER RELATING TO SCHOOL DISTRICTS' MONIES

19. The County Treasurer for each county holds the funds for school districts situated within that County. The money raised from local taxpayers and the equalization funds provided by the county and state are maintained and administered by the County Treasurer. Some large districts, such as Tucson Unified School District and Glendale Union School District, are pilot districts which means that they may issue their own warrants through the County Treasurer and have the warrants paid similar to writing a check for a bank to honor. Other smaller districts which have not been approved as pilot districts issue vouchers electronically to the County School Superintendent for the county in which the district is situated. The County Superintendent is responsible for processing the voucher and ensuring that the payment is made.

20. Under A.R.S. §15.996.1, the county treasurer has two options in establishing and maintaining these monies. Option #1 allows for the establishment, maintenance, and reporting of a separate account for each district fund. Option #2 allows for the consolidation of certain funds into two major accounts.

21. Maricopa County Treasurer implemented Option #2 effective July 1, 1998.

22. During my professional experiences, I have not known of any instances when a State has attempted to withdraw equalization assistance once it has been sent to the County Treasurer, unless an error was found in the amount sent.

23. If all of a district's funds are not spent at the end of the fiscal year, the balance does not revert back to the state.

24. If a school district spends all of the cash in its Maintenance and Operation fund before the end of the fiscal year, the school district does not receive additional equalization assistance.

25. The federal government also provides funding for the education of Arizona's school age children. Financial assistance from the federal government is usually provided in the form of grants. Some of the grants are sent to the Arizona Department of Education which is responsible for dispersing them to the counties for use by the local school districts. Other federal grants are provided directly to the county treasurers for use by the school districts.

CAPITAL FINANCING OF FACILITIES

26. In 1994, the Arizona Supreme Court issued a ruling in *Roosevelt Elementary School District No. 66 v. Bishop*, 179 Ariz. 233, 877 P.2d 806 (1994) ("*Roosevelt*") that led to changes in the public school financing in Arizona.

27. Under Arizona's school financing system in effect prior to *Roosevelt*, local school districts provided the funding for capital improvements through school district bonded indebtedness, capital outlay overrides approved by

the voters, school plant funds generated from sale or long term lease of school property, and capital funding.

28. Because the tax base of a local school district is based on the property value of the property within its boundaries, disparities in the quality of facilities among local school districts developed. Some local school districts' facilities did not meet health and safety codes while others had indoor swimming pools, satellite dishes and elaborate computer systems.

29. The state legislature responded to the Arizona Supreme Court's decision in *Roosevelt* by creating a legislative package known as Students First. The Students First legislation creates separate funds to address the disparity in the quality of physical facilities among Arizona's local school districts. Those funds are the New School Facilities Fund, the Building Renewal Fund, and the Deficiencies Correction Fund.

30. The purpose of the Students First legislation is to create standards for ensuring the adequacy of the physical facilities among districts without precluding local school districts from exceeding these "adequate" standards.

31. The Deficiencies Correction Fund is a fund set up to correct the deficiencies that exist in the adequacy of the physical facilities of the school districts to raise the quality of physical facilities of all school districts to meet standards for adequate facilities. Approximately $1 billion dollars was set aside to fix the facilities in all school districts and is to be spent by June 30, 2003. The Deficiencies Correction Fund is administered by a state Facilities Board. Consultants were hired to identify deficiencies based on minimum and uniform standards. Deficiencies,

for example, might include revamping an air conditioner or replacing faulty wiring. Construction firms selected by the state Facilities Board work with the school districts to develop bids for the project. These selected firms assist during construction and approve finished work. Then the state Facilities Board sends the money to the county treasurer and the school district pays the bills. Once the deficiencies are corrected or by June 30, 2003, the Deficiencies Correction Fund will cease to exist.

32. Moneys raised from raising the sales tax when voters approved Proposition 301 were used to fund the initial cost of correcting the inadequacies in the facilities of school districts in Arizona. Moneys generated from the passage and implementation of Proposition 301 also provided additional moneys for education unrelated to correcting the inadequacies in physical facilities.

33. The Building Renewal Fund is a fund which is used for major repair and minor renovations to maintain the quality of the physical facilities of local school districts after the physical facilities have been brought up to adequate standards through the Deficiencies Correction Fund. The Building Renewal Fund is also administered by the Facilities Board. A formula is applied which is based on the size of the school district, the number and age of the schools in the school district, and previous renovations. Based on this formula, local school districts with more new buildings will receive more money than a local school district of similar size with older buildings. Each local school district receives its allocation which is placed with the County Treasurer to spend on building renewal and major infrastructure within the district. The Building Renewal Fund is an ongoing fund.

34. The New School Facilities Fund is a fund which is used to pay for new school construction in local school districts. A formula is used to determine how much will be paid per square foot to local school districts to fund a new school. A formula is applied which includes the number of students in the local school district multiplied by a per square foot allocation, depending on whether it is for an elementary or high school and other factors. The product is the amount of funding which will be paid to the County Treasurer to pay for the new construction. The New Construction Fund is also an ongoing fund.

35. After Students First legislative changes, local school districts still retain the right to fund school construction using capital outlay overrides with voter approval, school plant funds which are generated from sale or long term lease of school property, class "B" bonds with voter approval and unrestricted capital within caps and with voter approval. To date, some local school districts, such as Cave Creek and Paradise Valley, have contributed more funding than was provided from the New Construction Fund.

36. The Soft Capital Fund is a fund that is designed to provide funding that permits school districts to purchase short term capital items, such as textbooks, instructional aids, furniture and equipment, library books, buses, technology equipment and software. A formula is applied which provides a specific dollar amount per student. The Soft Capital Fund, however, is allocated as an amount that is added to the base level funding for the student count before calculating the district's amount of equalization assistance as outlined in ¶¶ 5-18.

37. School districts must use these funds for the purposes for which they were intended and not for other debts or expenses.

38. Public school financing in Arizona for all other areas of budgetary expenditures, other than those affected by the Students First funds, is handled as it was prior to *Roosevelt* except for modifications and adjustments made each legislative session, and as described in ¶¶ 26-37.

AUTONOMY OF SCHOOL DISTRICTS IN BUDGETING FOR SCHOOL FUNDS FOR LEGAL EXPENSES AND JUDGMENTS

39. Subject to the approval of their governing boards, local school districts develop their own budgets in accordance with the budget limits set forth in statute. These budgets cover the administration, maintenance and operation of the schools, including but not limited to salaries and employment-related expenses for teachers, support staff and facilities staff; maintenance and operation of the facilities in the school district; provision of educational services, such as educational materials, equipment and instructional staff; and provision of extracurricular sports and programs.

40. Local school districts have discretion in budgeting. Local school districts have a budget limit for Maintenance and Operation. Within that Maintenance and Operation limit, local school districts budget amounts for programs, such as regular education programs, special education programs, transportation, drop out prevention programs, desegregation activities and programs, and kindergarten through 3rd grade override spending.

41. Because the formula is based on "block funding," the district has the discretion to allocate funds to where they are most needed, as long as statutory services are provided. For example, if the formula for transportation totals $150,000 and the district is able to provide the transportation services for $125,000, then the district may allocate the difference to teacher salaries, or to supplies. With the exception of the drop out and K-3 budget override allocations which are restricted, a district can spend more or less on a particular program without any approval from the state department of education. Districts have the discretion to spend more or less of the allocation to an unrestricted program as long as the district does not exceed the Maintenance and Operation budget limit.

42. Most local school districts budget for professional services, with a specific coding for legal services. Legal expenses in a school district's budget may include attorneys' fees should the district choose to hire a private law firm to represent them in matters as well as the cost of judgments.

43. One common way for a local school district to decide how much to allocate to legal costs and expenses is to look at how much the school district has spent in past years.

INSURANCE FOR SCHOOL DISTRICTS

44. School districts also have the discretion to purchase liability insurance or to operate their own self-insurance fund. School districts may obtain insurance by joining the Arizona School Risk Retention Trust, Inc.

45. The Arizona School Risk Retention Trust, Inc. is an intergovernmental agreement between a group of local school districts.

46. The board of trustees of the Arizona School Risk Retention Trust, Inc. includes school administrators from local school districts which participate in the fund.

PAYMENT OF JUDGMENTS

47. If a local school district is faced with a legal judgment it may use insurance to the extent it will cover the judgment. If the insurance does not cover the legal judgment – or all of the legal judgment – the school district may pay the judgment from their budget. The school district can either apply the budgeted amount for legal costs and fees or from another appropriate program in the budget. For example, if a school district owed back pay to a teacher under a judgment, they could use funds for teacher salaries to pay the back pay award.

48. When a local school district does not have sufficient funding in its budget to pay the judgment, the school district may petition the county board of supervisors to allow the district to exceed its budget by that amount. That amount must be levied against the taxpayers in the subsequent fiscal year.

49. No equalization assistance from the state is provided to fund the amount of a legal judgment or attorneys' fees that exceeds a local school district's budget.

50. The local school district may not use any of the funds from the New School Facilities Fund, the Deficiencies Correction Fund, the Building Renewal Fund and the Soft Capital Funds to satisfy the judgment.

51. The County Board of Supervisors can approve that the school district can exceed the budget. Next fiscal year, if sufficient cash is not available, the school district will be responsible for raising the funds to reimburse the county from their property tax base during the next fiscal year.

52. During my professional experiences, I know of instances where school districts have been sued in their own capacities, faced monetary judgments and monetary fines that must be paid for in the manner outlined in ¶¶ 47-51. Monetary judgments have been for legal expenses, such as the attorneys' fees for defending claims, for the prevailing parties' attorneys' fees, for asbestos removal, for criminal fines for mishandling of funds, for back pay awards to staff in employment claims and for personal injury awards.

/s/ Charlotte D. Borcher
Charlotte D. Borcher

Subscribed and sworn to before me this 31 day of June, 2001.

/s/ David E. Polosky
Notary Public

Pima County, Arizona
My commission expires: 12-4-01